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AN ESSAY

ON

REAL ASSETS:

OR

THE PAYMENT

OF

THE DEBTS OF A DECEASED PERSON OUT OF HIS REAL ESTATE,

AND

THE MEANS BY WHICH THAT PAYMENT OUGHT TO BE ACCOMPLISHED.

BY

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PREFACE.

THE embryo of the present work was an article published in the "Jurist" newspaper of the 16th of February, 1856, on the power of an executor to sell real estate under a charge of debts (*a*). The notice taken of this article by Lord St. Leonards in the last edition of his Treatise on the Law of Vendors and Purchasers (*b*), together with a letter on the subject received by the Author from Mr. Hayes, induced the republication of the article in a separate form, accompanied by the letter from Mr. Hayes, together with extracts from that gentleman's opinions, which he kindly permitted to be published. The communications from eminent persons in the profession, which this publication produced, induced the Author to believe that the views he had put forth were sanctioned by the great majority of real property lawyers. A partial remedy was applied by the

(*a*) 2 Jur. N. S., Part 2, p. 68.
(*b*) Sugd. V. & P. 545, n., 13th ed.

Legislature, but necessarily of a prospective kind (*c*). Owing to the fact that our law has no machinery for deciding doubtful points, however important, the decisions commented on were not brought before the Court of Appeal until very recently, when a case somewhat similar, but not turning upon the direct point, was brought before the Lords Justices (*d*). On this occasion a doubt respecting the doctrine in question was thrown out by the Lord Justice Knight Bruce. Shortly before this a case was decided by the Vice-Chancellor Wood, which seemed to the Author to strengthen the position he had taken (*e*). Encouraged by the indications thus afforded, and convinced of the continued importance of the subject, the Author has reproduced his argument in a more connected form. He has taken the opportunity of discussing some other kindred questions on which opinions have differed, and in doing so has been led to review the whole subject of real assets. He has also endeavoured in the last chapter to put together such suggestions for the amendment of this branch of the law, as have occurred to him in the course of his practice. By the arduous

(*c*) Stat. 22 & 23 Vict. c. 35, ss. 14—16.

(*d*) *Cook* v. *Dawson*, 7 Jur. N. S. 130; L. J., 21st and 24th March, 1861.

(*e*) *Hodkinson* v. *Quinn*, 1 Johns. & Hemm. 303; 7 Jur. N. S. 65.

exertions of the late Sir Samuel Romilly, followed by the more successful efforts of his son, the present Master of the Rolls, the main difficulty has been overcome, and substantial justice has been awarded to the creditors of all deceased persons (*f*). But in the way of simplification much it seems has yet to be accomplished; and the Author's suggestions are intended as a humble contribution towards so desirable an end.

(*f*) Stat. 3 & 4 Will. IV. c. 104.

7, New Square, Lincoln's Inn,
7th May, 1861.

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ESSAY ON REAL ASSETS.

CHAPTER I.

LEGAL AND EQUITABLE ASSETS.

The subject. THE subject of the present Essay is the payment of the debts of a deceased person out of his real estate, and the means by which that payment ought to be accomplished. There is, perhaps, no subject on which judicial decision has been more fluctuating; nor is there any which seems at the present time more imperatively to demand the intervention of the legislature. But the probe must be applied before the knife can be of service. An inquiry into the present state of the law upon this matter may perhaps suggest and facilitate some permanent amendment.

To be considered historically. The subject is one which it is impossible to understand, without considering it historically. The present state of the law is the result of a long and arduous struggle for the just rights of creditors, a struggle in which the honoured name of the late Sir Samuel Romilly will always be remembered as having borne a conspicuous part. But, independently of Parliament, the Judges have from time to time done the utmost in their power to prevent men from "sinning in their graves," and to facilitate the distribution of their real estate amongst their creditors. Whether zeal may not occasionally have outstripped discretion is a question

which may possibly suggest itself; but the error, if any, is one on the right side.

Specialty binding the heir.

In early times, when land was not devisable except by special custom, or by means of a feoffment to uses, the heir could be bound to pay the debt of his ancestor only by the deed of the ancestor under seal, in which the heir was expressly named. This was called a special contract, or specialty binding the heir; and the heir then became liable, on the decease of his ancestor, to pay the debt thus secured, to the extent of the value of the lands which had descended to him from the ancestor who had sealed the specialty (*a*). The lands descended were called *assets* by descent, from the French word, *assez*, enough; because the heir was bound to pay only if he inherited lands enough (*b*). Simple contract creditors were entirely without remedy, as against the heir. Those persons, however, who had lands devisable by custom, or who had conveyed their lands to feoffees to uses, were not unfrequently anxious that their debts should be paid; they accordingly either devised their lands to their executors for that purpose, giving them an estate, or directed their lands to be sold by their executors, giving them a mere power. In either case, the money which came to the hands of the executors was mixed up with the other funds held by them, *virtute officii*, and was long considered to be *legal assets;* that is, assets distributable amongst the creditors according to their legal priorities, in the same manner as the purely personal estate (*c*). In accordance with this principle, it was laid down by three of the Judges, in the reign of Henry VII. (*d*), that if a man make his will, that his

Assets.

Produce of sale of lands formerly legal assets.

(*a*) Bac. Abr. tit. Heir and Ancestor (F); Co. Litt. 376 b.

(*b*) 2 Black. Comm. 244; Bac. Abr. tit. Heir and Ancestor (I).

(*c*) 1 Atkins, 420, n. 1; Roll. Abridg. tit. Executors (G).

(*d*) Year Book, 15 Hen. VII., fol. 12; Sugd. Pow., Appendix, No. 1.

land which his feoffees have shall be sold and aliened, and does not say by whom, then his executors shall aliene and not the feoffees; for the money to arise by the sale of the executors shall be *assets in their hands, and therefore they shall sell.* The money was considered to be legal assets, coming to the executors as such by virtue of their office, in the same manner as any other personal estate; and, consequently, they took by implication a power to sell the lands whence the money was to arise.

In the reign of Henry VIII. an act was passed for regulating the granting of the probate of wills and other incidental matters (*e*), and one of the sections of this act would seem to have been directed to the subject in question. It is enacted, in sect. 5, that if the person deceased will, by his testament or last will, any lands, tenements or hereditaments to be sold, "that the money thereof coming, nor the profits of the said lands for any time to be taken, shall not be accounted as any of the goods or chattels of the said person so deceased." It is remarked, by the author of "Wentworth's Office of Executors," a book first published in 1641, and supposed to have been written by Mr. Justice Dodderidge, that since that statute the law was twice admitted or conceived to be still according to the old authorities, namely, that the land devised to be sold, or the money thereof coming, should be assets; and he suggests that it is possible that the statute might have been forgotten, as in other cases sometime hath happened (*f*). And he reconciles the subsequent decisions with the act, by supposing that the parliament may have meant to exclude the lands from the valuation only. Notwithstanding this statute, therefore, the produce of lands directed

Stat. 21 Hen. VIII. c. 5, s. 5.

(*e*) Stat. 21 Hen. VIII. c. 5.
(*f*) Wentworth's Executors, p. 179, 14th ed.

to be sold by executors was still considered to be legal assets (*g*).

All lands devisable by will.

In process of time, however, a change took place. By the joint operation of the Statute of Wills (*h*), and the Statute of Charles II., by which feudal tenures were abolished (*i*), all freehold lands became devisable by will. For a time creditors were worse off than ever. Before this a man might, by specialty, have bound his heir; but now the heir himself was defeated by the statutory power of devising given to the ancestor. The creditor by specialty accordingly became no better off than the creditor by simple contract. The title of the devisee prevailed against all creditors whomsoever, unless they were secured by some mortgage or lien on the lands. Under these circumstances, a sense of justice not unfrequently urged testators to direct their devisees, in the first place, to pay their debts. Lands were often thus devised *to other persons than the executors*, subject to a trust in favour of the creditors; and in this case the remedy of the creditors was in equity only. The creditors were persons who, without any legal right, were charitably considered by their debtor as proper persons to be relieved; and courts of equity, in administering this relief, adopted the rule that equality is equity. All the creditors, therefore, were, under a trust of this kind, rateably paid, whether merely simple contract creditors, or creditors holding specialties binding the heirs. And not only this, but specialty creditors who had been preferred in the distribution of the personal estate, were forbidden to participate without first bringing into account what they had thus received (*k*).

Effect on creditors.

Devise to pay debts.

Remedy in equity.

All paid rateably.

(*g*) *Deg* v. *Deg*, 2 P. Wms. 416, n. 2.

(*h*) Stat. 32 Hen. VIII. c. 1, explained by Stat. 34 & 35 Hen. VIII. c. 5.

(*i*) Stat. 12 Car. II. c. 24.

(*k*) *Wride* v. *Clarke*, 1 Dickens, 382; 2 Jarm. on Wills, 524, 2nd ed.

Equitable assets.

The produce of the sale was accordingly called *equitable assets*. The executor, as such, had nothing whatever to do with this money. It did not belong to him by virtue of his office, and it was distributable in a totally different way from the money which, *virtute officii*, came to his hands. It was next decided, in opposition to the old authorities, that the circumstance of the devise being to the persons who were also named executors, did not alter the rule, provided the devise were to the executors and their heirs (*l*). This point was decided by Lord Camden in *Silk* v. *Prime* (*m*): his Lordship remarked, "It is a good rule of expounding wills to make them speak in favour of equitable assets, if it may be done; that if you can lodge the assets in the hands of the trustees, *the court will never put them in the hands of the executors;* and when one person is invested with both characters, the trustee shall be preferred." This case is referred to by Lord Thurlow, in *Newton* v. *Bennett* (*n*), as settling the point, that the circumstance of giving the real estate by any means to the executor, shall not occasion the produce of it, when sold, to be applied in the Ecclesiastical Court. It long, however, remained doubtful whether, if the executor had a merely naked power to sell *quâ* executor, the assets were legal or equitable (*o*). Ultimately, however, it became settled law that even where only a power is given to sell to pay debts, and whether the power be given to the executors expressly or by implication, the proceeds of the sale are *equitable* and not legal assets (*p*).

Devise to persons who were executors.

Silk v. *Prime*.

Power to executor to sell.

Assets now equitable.

Legal assets.

Legal assets, we have observed, are those which come

(*l*) 2 Fonblanque on Equity, 402.

(*m*) 1 Bro. C. C. 137, n.

(*n*) 1 Bro. C. C. 135.

(*o*) 2 Fonblanque on Equity, 402.

(*p*) 2 Sugd. Pow. 31, 6th ed., 28, 7th ed.; 2 Williams on Executors, 1522, 5th ed.

to the executor by virtue of his office, and are distributable among the creditors according to their legal priorities. They are called legal because the remedy of the creditor is in a court of law, and not in a court of equity; whilst equitable assets are those for which the remedy of the creditor lies in a court of equity (*q*). It is, however, the nature of the creditors' remedy, and not the nature of the remedy which the executor may have, which determines whether the assets be legal or equitable. A legacy, therefore, due to the testator, though recoverable by the executor only in a court of equity, is not equitable but legal assets; for, when he shall have obtained it by the aid of that court, the creditors of the testator have their remedy *against him* in a court of law.

Equity of redemption of leaseholds.

It was, however, long held that, if an executor were obliged to come into a court of equity in order to obtain possession of leaseholds which had been mortgaged, and the right to redeem which devolved on him by virtue of his office, the property so obtained became from this circumstance equitable assets (*r*). This doctrine, though evidently anomalous, was for a long period recognized as law (*s*). At length, however, it has been set aside. The credit of placing the law in this respect on its proper footing is due to a learned living Judge (*t*), who, in *Cook* v. *Gregson* (*u*), decided that the equity of redemption of a sum of money charged on land, was legal assets in the hands of the executor; thus in fact overruling the old decisions respecting leaseholds, and showing moreover that error, however long established, is not sheltered by any statute of limitations.

Cook v. *Gregson.*

The law now settled.

The line of demarcation between legal and equitable

(*q*) 2 Williams on Executors, 1520, 5th ed.

(*r*) The case of the creditors of *Sir Charles Cox*, 3 P. Wms. 341, 343; *Hartwell* v. *Chitters*, Amb. 308.

(*s*) See 1 Barn. & Cress. 372, per Bayley, J.

(*t*) The Vice-Chancellor Kindersley.

(*u*) 3 Drew. 547.

assets is now clearly and broadly defined. All personal estate which comes to the executor *virtute officii* is legal assets, and distributable as such by whatever means it may come to his hands (*x*); whilst the produce of real estate, subject to any trust or charge whatever for the payment of debts, does not belong to the executor by virtue of his office, but is equitable assets, and divisible as such amongst all the creditors equally (*y*).

Estate *pur auter vie.*

Estates *pur auter vie*, though freeholds, are by special enactment to be distributed by the executors on whom they may devolve, in the same manner as the personal estate; they are accordingly legal assets, although the executor may be obliged to resort to a court of equity in order to obtain them (*z*).

Judgment debts.

There is one species of debts which stands, with respect to real estate, on a different footing from other debts, namely, debts secured by any judgment, decree, order or rule made by any of the superior courts of law, or equity, or by the Lord Chancellor or the Lords Justices in matters of bankruptcy or lunacy. Judgment debts formerly gave to the creditors holding them such a lien on the lands of their debtor, as gave them a right to redeem any mortgage thereon, and also to be paid thereout on his decease, in preference to any other creditors, whether holding specialties binding the debtor's heirs or not (*a*). And now all judgments, &c., are, by the statute 1 & 2 Vict. c. 110, made an express charge on all lands and hereditaments, including copyholds, of or to which the debtor shall at the time of en-

Now an express charge.

(*x*) *Cook* v. *Gregson*, 3 Drew. 547; *Shee* v. *French*, 3 Drew. 716; *Attorney-General* v. *Brunning*, H. of Lords, 6 Jur. N. S. 1083.

(*y*) *Clay* v. *Willis*, 1 B. & C. 364; *Barker* v. *May*, 9 B. & C. 489; *Lowe* v. *Petkett*, 16 C. B. 500; 1 Jur. N. S. 1049.

(*z*) Stats. 29 Car. II. c. 3, s. 12; 14 Geo. II. c. 20, s. 9; 7 Will. IV. & 1 Vict. c. 26, s. 3; *Christy* v. *Courtenay*, 26 Beav. 140.

(*a*) *Sharpe* v. *Earl of Scarborough*, 4 Ves. 538.

tering up such judgment, and at any time afterwards, be seised or entitled for any estate or interest whatever, at law or in equity, or over which he shall at the time of entering up such judgment, or at any time afterwards, have any disposing power, which he may, without the assent of any other person, exercise for his own benefit (*b*). Judgments, &c., are also binding as against the debtor, and all persons claiming under him after such judgment, and also as against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion or other interest in or out of any lands or hereditaments. And every judgment creditor has the same remedy in equity against the hereditaments charged, as he would be entitled to in case the debtor had power to charge the same, and had by writing under his hand, agreed to charge the same with the amount of the judgment debt and interest thereon. But no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge, until after the expiration of one year from the time of entering up such judgment (*c*).

Registration.

And no judgment is by virtue of the act to affect lands, tenements or hereditaments as to purchasers, mortgagees or creditors, unless registered and re-registered in the Common Pleas Office within the five previous years, in the manner provided by several recent statutes (*d*). A registered judgment is consequently now tantamount to an equitable charge on the lands of the debtor, and must therefore be paid off before any of the other creditors can be let in.

Legal order of distribution of personalty

The following is the legal order in which personal estate, which comes to the hands of an executor or ad-

(*b*) Stat. 1 & 2 Vict. c. 110, s. 13.

(*c*) *Ibid.* See *Yescombe* v. *Landor*, 28 Beav. 80.

(*d*) Stats. 1 & 2 Vict. c. 110, s. 19; 2 & 3 Vict. c. 11; 18 & 19 Vict. c. 15.

ministrator by virtue of his office, is distributed among the creditors of the deceased. First come debts due to the crown by record or specialty (*e*), and also debts due to the crown from accountants to the crown, whose yearly or total receipts exceed 300*l.* (*f*); next, certain specific debts, which by particular statutes are to be preferred to others, as debts due to the parish by overseers of the poor (*g*), debts due to friendly societies by their officers (*h*), and regimental debts due from any officer or soldier dying in the service (*i*). Next to these come judgment debts; but a recent act of parliament now provides that no judgment shall have any preference in administration against heirs, executors or administrators, unless the same shall have been registered, or re-registered, under the modern acts for registering judgments (*j*), within five years previously to the death of the testator or intestate (*k*); and the term judgment includes all registered decrees and orders of courts of equity and bankruptcy, and other orders having the operation of a judgment (*l*). Next to judgments come recognizances or obligations entered into before a court of record, or a magistrate duly authorized, conditioned for the performance of a particular act. With these formerly ranked statutes merchant, statutes staple, and recognizances in the nature of a statute staple, all of which are now obsolete. Next in precedence come debts secured by deed under seal, commonly called specialty debts. It matters not to the executor whether the heir be or be not bound by the specialty. That which gives the debtor preference out of the personal

amongst creditors.

Crown debts.

Debts by particular statutes.

Judgment debts duly registered.

Recognizances and statutes.

Specialty debts.

(*e*) Wentworth's Executors, 261, 14th ed.; 2 Williams on Executors, part 3, book 2, c. 2, 5th ed.

(*f*) Stat. 13 Eliz. c. 4.

(*g*) Stat. 17 Geo. II. c. 38, s. 3.

(*h*) Stat. 18 & 19 Vict. c. 63, s. 23.

(*i*) Stat. 58 Geo. III. c. 73, ss. 1, 2.

(*j*) Stats. 2 & 3 Vict. c. 11; 18 & 19 Vict. c. 15.

(*k*) Stat. 23 & 24 Vict. c. 38, ss. 3, 4.

(*l*) Stat. 23 & 24 Vict. c. 38, s. 5.

estate, is the circumstance of its being secured by deed under seal. It is true that bonds, which are the most usual kinds of specialties, are always expressed so as to bind the heir; but the reason why an executor or administrator must prefer a bond creditor to one by simple contract, is merely this, that the one holds a deed under seal, while the other does not (*m*). If the specialty should not bind the heir, it will still maintain its preference out of the personal estate, though it may not be equally favoured should the real estate be resorted to.

Arrears of rent.

Arrears of rent, being rent service and not rent charge merely, rank equally with specialties, even though the rent be reserved by parol (*n*); this is a consequence of the feudal relation between landlord and tenant which still exists in England, and it has been held not to apply to lands out of the country (*o*). Last of all come debts by simple contract merely, for bonds or covenants of a merely voluntary nature, can scarcely be considered as more than gifts. They are postponed to simple contract debts (*p*).

Simple contract debts.

Voluntary bonds.

So much for the order in which debts must be paid out of the personal estate. In none of the books does any hint occur that one part of the general personal estate is more liable than any other part to the payment of debts; save only that if any of the personalty be specifically bequeathed, the intention of the testator must be respected, and the specific bequest must accordingly be last applied. A specific legacy is now held to be as much favoured as a specific devise of real estate, and ranks in priority on the same footing (*q*).

Specific bequest.

(*m*) Wentworth's Executors, 238, 339, 14th ed.

(*n*) 2 Williams on Executors, 910, 5th ed.

(*o*) *Vincent* v. *Godson*, 4 De Gex, M. & G. 546.

(*p*) 2 Williams on Executors, 914, 5th ed.

(*q*) *Long* v. *Short*, 1 P. Wms. 403; *Gervis* v. *Gervis*, 14 Sim. 654, where the learned Judge overruled his former decision in *Cornewall* v. *Cornewall*, 12 Sim. 298.

Pecuniary legacies.

And rather than that a specific legatee should suffer, the pecuniary legacies must abate, or, if necessary, remain unpaid. Not long ago, however, a doctrine was broached which seems to require attention. A lady died intestate possessed of a large personal estate, including many leaseholds for years, and leaving a brother her sole next of kin, who died a few weeks afterwards, having bequeathed his leaseholds to one person, and the residue of his personal estate to others. It was held that the legatee of the leaseholds was entitled to retain them, not only discharged from the debts of the testator, by whom they were bequeathed, but also *discharged from the debts of the intestate lady*, to which, according to the general understanding, they were rateably liable, in common with the rest of her personal estate (*r*). This decision suggests very serious questions. If leaseholds for years are not to be resorted to on account of the difficulty of realizing them, is the comparative difficulty of realization to establish a new scale of priorities? and if so, by what rule is this scale to be regulated? As a matter of prudence and economy, there is no doubt that an executor ought first to lay hands on that part of the residue which is most easily available; but this is a very different thing from establishing a rule of priorities as between different claimants. If cash at the bankers is to be first applied, do consols rank prior or subsequently to other stock? Are railway debentures liable primarily to railway shares? Is there any legal priority of shares for which there is ordinarily a market over shares for which there is ordinarily none? The rule laid down in all the text-books, that the general personal estate is primarily liable to the payment of debts, is, it is submitted, strictly true, no one part being more legally liable than any other. It is quite consistent with this rule to say that some part may more properly

Lady Langdale v. *Briggs*.

(*r*) *Lady Langdale* v. *Briggs*, L. J., 2 Jur. N. S. 982, 995.

and prudently be first made available, but if the rights of parties should thus be disturbed, is it not in the province of equity to readjust them?

Power of appointment.

There is one kind of personal estate which is certainly applicable to the payment of debts, and yet it is said shall not be resorted to until all the rest has failed. This is property which never belonged to the deceased as his own, but over which he may have had conferred on him a general power of testamentary appointment, to be exercised or not at his discretion. If he should not think fit to exercise the power, the creditors can say nothing (*s*); but should he exercise it, courts of equity have long since held that his creditors must first be paid, before the appointee can take under the appointment (*t*). But it is said that the testator's own property, even though specifically bequeathed, being primarily liable, must first be exhausted before a fund of this nature can be resorted to (*u*). It is difficult to see upon what principle the appointee under such a power can rank higher than a specific legatee. And Lord Hardwicke, in *Bainton* v. *Ward* (*x*), puts the exemption no higher than that the appointees should take as specific legatees. The reason why the appointed fund is made assets in equity is, that by exercising the power the testator has in a manner made it his own. The priority of a specific legatee depends upon the testator's intention. Does the testator intend that the appointee shall take under the power with any stronger purpose than he intends that the specific legatee shall take under his bequest? It has, however, been thus decided (*y*).

Liability of appointee.

(*s*) *Holmes* v. *Coghill*, 7 Ves. 499.

(*t*) *Bainton* v. *Ward*, 2 Ves. sen. 2; 7 Ves. 502, n.

(*u*) *Fleming* v. *Buchanan*, 3 De Gex, M. & G. 976, 979.

(*x*) 2 Ves. sen. 2.

(*y*) *Fleming* v. *Buchanan*, ubi supra.

Personalty appointed is legal assets.

There seems little doubt that, according to the principle of the recent decisions (*z*), personal estate appointed under a general power would now be considered as legal assets, and distributable among the creditors according to their respective priorities, rather than equitable assets distributable equally (*a*). For, although obtained only through the medium of a court of equity, it is distributable of right, and forms no part of the bounty of the testator. It was indeed held, after much conflict of opinion, that prior to the recent statutory alteration in the law (*b*) the property appointed was not subject to probate duty (*c*). But this was because probate was granted for that property only, which, but for the will, the ordinary would have been entitled to administer (*d*). It vests in the executor by virtue of his office, and he has to pay the legacy duty thereon (*e*). It cannot, therefore, it is submitted, be any other than legal assets.

Equitable assets distributed equally.

Equitable assets, as we have said, are distributed equally amongst all the creditors; and, among the assets themselves, there appears to be no priority, except that which, as we shall hereafter see, is constituted by the difference between a trust to pay debts and a mere charge only. If the testator has committed part of his real estate to any person upon a trust for payment of his debts thereout, or has ordered part to be sold for that purpose, the property so appropriated will be liable primarily to any other portion, which a desire to be honest may have induced him merely to charge with the payment of his debts (*f*).

A trust and a charge.

(*z*) *Cook* v. *Gregson*, 3 Drew. 547; *Shee* v. *French*, 3 Drew. 716.

(*a*) See 2 Chance on Powers, 148.

(*b*) Stat. 23 Vict. c. 15, s. 4.

(*c*) *Drake* v. *Attorney-General*, 2 Cl. & Finn. 257.

(*d*) *Platt* v. *Routh*, 6 Mee. & Wels. 791.

(*e*) See the argument of the present Lord Chancellor when Solicitor-General, *In re Cholmondeley*, 1 Cr. & Mee. 167.

(*f*) *Harmood* v. *Oglander*, 8 Ves. 106, 125.

Lands not charged with debts.

Lands not charged with the payment of debts are sometimes called legal assets. We shall hereafter see, that in their distribution a preference is given to one class of creditors before another, those who have specialties binding the heirs being preferred to those who have not. But the proceeds of lands so situated must not be confounded with the legal assets which come to an executor by virtue of his office, which are strictly confined to the proceeds of the personal estate, and which are distributed according to an entirely different scale of priorities (*g*).

(*g*) See *Lovegrove* v. *Cooper*, 2 Sm. & Giff. 271, which seems to be inconsistent with this principle if the report be correct, which has been doubted. See 2 Williams on Executors, p. 1523, note, 5th ed.

CHAPTER II.

OF INTESTACY.

We have remarked (*a*) that, in early times, the heir could be bound to pay the debt of his ancestor only by specialty, or deed under seal, in which the heir was expressly named. In case of intestacy, such a specialty still retains its original force, though simple contract creditors are now subsequently admitted. Two things are necessary; first, that there should be a deed under seal, and secondly, that in that deed the heir of the debtor should be expressly bound to payment. Accordingly, much as bills of exchange and promissory notes are favoured in law, and special as are the remedies which have been provided for their enforcement (*b*), a bill of exchange or a promissory note still remains merely a simple contract debt (*c*); and the holder, in case of the debtor's intestacy, was long without any remedy against the heir, and even now is postponed to those creditors who hold specialties binding the heir. Again, stringent as are the rules of equity in enforcing trusts and in punishing their breach, a *cestui que trust* is a mere simple contract creditor of the trustee; and in case the trustee should die intestate, having made away with the trust property, the *cestui que trust*, if he have no specialty binding the heirs, will be postponed to those creditors who hold such deeds. Even if the trust is created by deed, yet unless there is a covenant by the trustee binding his heirs, the *cestui que trust* can-

Bills of exchange.

Breach of trust.

(*a*) *Ante*, p. 2.

(*b*) See stat. 18 & 19 Vict. c. 67.

(*c*) *Yeoman* v. *Bradshaw*, 3 Salk. 164; 1 Williams on Executors, 279, 5th ed.

not rank with creditors who hold specialties binding the heirs of the deceased (*d*).

Liability of heir is personal.

The liability of the heir is a personal liability to pay the debt to the extent of the lands which may come to him by descent from the ancestor by whom the debt was contracted. The remedy of the creditor at law is an action, against the heir, of debt or covenant according to the nature of the specialty. And equity, exercising an ancillary jurisdiction, will, at the suit of the creditor, order a sale by the heir of all hereditaments which the law considers to be assets by descent (*e*). If, however, the heir should aliene the lands descended for valuable consideration, as by sale or on marriage, prior to any suit, the creditors cannot follow the lands in the hands of the alienee (*f*).

Actions of debt and covenant.

Sale in equity.

Alienation by heir.

Heir aliening liable for value.

It was however enacted by an act of William and Mary, to which we shall hereafter have occasion to refer (*g*), that if the heir, being liable to pay the debt of his ancestor in regard of any lands, alienes such lands before any action brought, or process sued out against him, he shall be answerable for his ancestor's debts to the value of the lands aliened. This enactment gave legal validity to a rule which had before existed in equity only.

A reversion or remainder.

A reversion or remainder, whether expectant on a term of years or on an estate of freehold, is assets by descent in the hands of the heir, so as to make him liable to pay the ancestor's debts by specialty in which

(*d*) *Adey* v. *Arnold*, 2 De Gex, M. & G. 432, 437; *Richardson* v. *Jenkins*, 1 Drew. 477. See also *Wynch* v. *Grant*, 2 Drew. 312, qu.?

(*e*) *Robinson* v. *Tonge*, 3 P. Wms. 401; *Tyndale* v. *Warre*, Jacob, 212; *Pimm* v. *Insall*, 1 Mac. & G. 449.

(*f*) *Spackman* v. *Timbrell*, 8 Sim. 253; *Richardson* v. *Horton*, 7 Beav. 112.

(*g*) Stat. 3 Will. & Mary, c. 14, s. 5, repealed and re-enacted by stat. 11 Geo. IV. & 1 Will. IV. c. 47.

the heirs are bound to the extent of its value (*h*); but at law it cannot be realized under the ordinary writ of execution until it falls into possession. It was once thought that a reversion expectant upon an estate tail was not assets, because it was in the power of the tenant in tail to bar it at his pleasure (*i*). Lord Hardwicke, however, in *Kinaston* v. *Clarke* (*k*) decided that it was assets in equity for the debt of the first taker secured by a specialty binding the heir. His Lordship said "The saying a reversion in fee after an estate tail is not assets is a gross expression, not accurate, and arises from the method of pleading allowed to the heir, that he may plead *riens per descent;* but if the creditor may take a reversion when it comes into possession, it shows a liableness in the thing to be assets." This decision was followed by Sir T. Plumer, M. R., in *Tyndale* v. *Warre* (*l*).

Reversion on an estate tail.

The legal remedy of the creditor could, however, only be enforced against an heir who had come to the lands by descent from the debtor *as the stock of the descent.* A reversion or remainder expectant on an estate of freehold formerly descended, and in fact still descends, not to the heir of the last owner on his intestacy, but to the heir of the purchaser as the stock of descent. It was accordingly held that a reversion was not liable even in equity to the bond debts of an intermediate heir, on whom the same had descended, but on whose decease it descended again to the next heir, not as heir to him (though he happened to be so), but as heir to the first purchaser (*m*). There was certainly a decision of the Court of Common Pleas to the contrary in the case of

Reversion not assets for debt if mesne heir.

(*h*) Brooke's Abridg. tit. Assets per descent, pl. 19.

(*i*) *Brediman's case*, 6 Rep. 58.

(*k*) 2 Atk. 204; 2 Cruise's Dig. tit. Reversion, s. 31.

(*l*) Jacob, 212.

(*m*) *Giffard* v. *Barber*, 2 Cruise's Dig. tit. Reversion, s. 38; *S. C.*, 4 Vin. Abr. 451; 1 Ves. sen. 174.

Smith v. *Parker* (*n*); but this case was subsequently denied to be law by Lord Alvanley, in delivering the judgment of the same court in the case of *Doe* v. *Hutton* (*o*). And the law, as laid down by Lord Hardwicke, is in accordance both with legal principles and with the old authorities (*p*).

Inheritance Act.

By the act to amend the law of inheritance (*q*), the descent of all estates, whether in possession or reversion, is traced from the purchaser; and it seems to follow from the principles just stated, that the heir can only be liable at law to the specialties of the first purchaser, and not to those of any intermediate heir, to whom he may immediately succeed. In equity, however, a modern statute of great importance (*r*) has, as we shall hereafter see, remedied this inconvenience.

The Statute of Frauds.

As the law did not recognize trusts, the heir of a person who had only an equitable estate of inheritance in lands, was in former times free from any liability to pay the debts of his ancestor, secured by specialties binding his heirs (*s*). To remedy this defect, it was provided by the Statute of Frauds (*t*), that if any *cestui que trust* shall die, leaving a trust in fee simple to descend to his heirs, such trust shall be assets by descent, and the heir shall be chargeable with the obligation of his ancestors, for and by reason of such assets, as fully as he might have been if the estate in law had descended to him in possession in like manner as the trust descended. In the construction of this statute, it was held, that only plain and simple trusts for the debtor were comprised within its meaning; and that if the debtor had mortgaged his lands in fee and died, the

(*n*) 2 Sir W. Black. 1230.
(*o*) 3 Bos. & Pul. 643, 650.
(*p*) Co. Litt. 11 b, n. (3). See 2 Wms. Saunders, 9 a.
(*q*) 3 & 4 Will. IV. c. 106.
(*r*) 3 & 4 Will. IV. c. 104; *Evans* v. *Brown*, 5 Beav. 114.
(*s*) *Bennet* v. *Box*, 1 Ch. Cases, 12; *Prat* v. *Colt*, ib. 128.
(*t*) Stat. 29 Car. II. c. 3, s. 10.

equity of redemption which belonged to him was not a trust in fee simple left by him within the meaning of the statute (*u*). If, however, as was formerly more usual, the mortgage were for a term of years only, the legal inheritance in fee simple plainly descended to the heir, and was assets by descent, not by virtue of the Statute of Frauds, but by the common law. In *Plunket* v. *Penson* (*x*), Lord Hardwicke said, "I do agree that if a mere trust estate descends upon an heir at law, that it will be considered as legal and not as equitable assets; and this is founded upon the third (*y*) clause of the statute, which gives a specialty creditor his remedy at law by an action of debt against the heir of the obligor; but it has not made a mortgage in fee of a trust estate subject to the same thing. If there is a mortgage for a thousand years, and the reversion in fee left in the mortgagors, it will be legal assets, because the bond creditor might have judgment against the heir of the obligor, and a *cesset executio* till the reversion come into possession; but where it is a mortgage of the whole inheritance, I do not see what remedy a bond creditor can have to make it assets at law, and if the specialty creditor shall bring an action against the heir he may plead *riens per descent*."

Equity of redemption.

Mortgage for a term.

Mortgage in fee.

The case of *Plunket* v. *Penson*, from the judgment in which we have just quoted, is sometimes cited as an authority for the broad proposition that an equity of redemption constitutes equitable assets (*z*). Such a propo-

Plunket v. *Penson*.

(*u*) *Plunket* v. *Penson*, 2 Atk. 290.

(*x*) 2 Atk. 293, 294.

(*y*) Qu. 10th. See 29 Car. II. c. 3, s. 10. The 3rd section of the stat. 3 & 4 Will. & Mary, c. 14, was pointed against devisees.

(*z*) 2 Spence's Equitable Jurisdiction, 643; Coote on Mortgages, 213, 3rd ed.; 2 Jarm. on Wills, 525, 2nd ed. In the former edition (Vol. 2, p. 545,) it was correctly said, that property which the testator has not subjected to debts is not distributable as equitable assets, merely because it is an object of equitable jurisdiction.

Former effect of a charge of debts.

sition is, however, incorrect, and the case of *Plunket* v. *Penson* affords no authority for it. In order to understand the decision in that case, it must be remembered that, at the time when it was decided, a mere charge of debts by a testator, who devised his lands to his heir at law, or suffered them to descend subject to such a charge, was not considered as depriving the creditors by specialty in which the heirs were bound of their legal right of payment out of the lands descended. The law in this respect was altered by the decisions of Lord Eldon in *Baily* v. *Ekins* (*a*), and *Shiphard* v. *Lutwidge* (*b*), since which, under a mere charge, simple contract creditors have been allowed an equal right of participation. In *Plunket* v. *Penson*, the testator, Mr. Penson, having, with the concurrence of his trustee, mortgaged in fee a real estate of which he was *cestui que trust*, by his will gave the mortgaged premises to his son and heir at law in fee, subject nevertheless to the payment of his debts, and died indebted by bond and simple contract.

Decision in *Plunket* v. *Penson*.

Lord Hardwicke decided two things, first, that the equity of redemption of a mortgage in fee was not legal assets within the 10th section of the Statute of Frauds (*c*), and consequently that the bond creditors had no *legal priority* by reason of their holding specialties binding the heir; and, secondly, that *by reason of the charge of debts* the equity of redemption was equitable assets, and that the produce thereof should therefore be distributed among all the creditors rateably.

Equity of redemption assets in equity to pay bond creditors.

In the absence of the charge of debts, there was no ground whatever for letting in the simple contract creditors on the equity of redemption. With regard, however, to creditors holding specialties binding the heir, it had been before decided, that the equity of redemption of a mortgage in fee, though not legal assets

(*a*) 7 Ves. 319.
(*b*) 8 Ves. 26.
(*c*) Stat. 29 Car. II. c. 3.

giving the creditors a remedy at law, was yet in equity to be considered as assets to satisfy creditors having specialties binding the heir (*d*). This was quite consistent with holding that the bond creditors had no remedy at law. The jurisdiction of equity was here exercised by analogy in favour of those who would have been entitled had the subject of descent been legal, namely, creditors having specialties binding the heir. The case was similar to that of a reversion already mentioned (*e*), or of an advowson hereafter mentioned (*f*), which were sold in equity to satisfy bond creditors, notwithstanding the fact that by legal process they were without remedy.

Accordingly a mortgagee might tack a bond debt against the heir;

In accordance with these principles it was held, that, whether the mortgage were for a term of years or in fee simple, the heir at law could not redeem the mortgage without at the same time paying off any bond debt of his ancestor which the mortgagee might hold (*g*). In the case of a mortgage for a term, the inheritance, and also the equity of redemption of the term, were liable in the hands of the heir to the bond debts of the ancestor; and in the case of a mortgage in fee, the equity of redemption of the inheritance, though not legal assets, was liable in equity to satisfy the demands of the bond creditors. The heir, being thus bound to pay the bond debts, was not allowed to redeem the mortgage without, at the same time, paying the bond. The bond debt, in legal phrase, was tacked to the mortgage as against the heir. A simple contract debt, however, due to the mortgagee, was not allowed to be tacked to the mortgage as against the heir, because the mortgagee had no claim whatever on the heir for the payment thereof in respect of the equity of redemption which descended to him.

but not a simple contract debt.

(*d*) *Solley* v. *Gower*, 2 Vernon, 61; 2 Wms. Saunders, 8, *i*.

(*e*) *Ante*, p. 17.

(*f*) See *post*, p. 22.

(*g*) 2 Fonblanque on Equity, 272.

Advowson.

There is another point in which equity seems to have a little outstepped the law, and that is, in the case of an advowson descending to the heir. An advowson was property of such a nature that no writ, which the creditor could obtain in an action of law, could affect it. Equity, therefore, acting on the principle of being merely ancillary to the legal remedy, or on the principle of avoiding circuity of action, would not have interfered. But an advowson being valuable, equity ordered it to be sold for the payment of creditors by specialty in which the heirs were bound (*h*).

Copyholds.

Copyhold estates, being at law merely estates at the will of the lord, were not considered in law to be assets by descent in the hands of the customary heir to satisfy his ancestor's bond debts (*i*); and equity, following the law, held that the customary heir of a copyholder, who had mortgaged his lands, might redeem the mortgage, without at the same time paying off a judgment debt belonging to the mortgagee (*k*): *à fortiori*, the heir might have redeemed without paying off a bond debt. Here there seems to have been an adherence to strict principle singularly in contrast with the rules respecting an advowson, and an equity of redemption of a mortgage in fee.

Deceased traders.

Thus the law stood for many years, the simple contract creditors being without any remedy whatsoever against the lands of their debtor, except such as his liberality might afford them. At length, by the exertions of Sir Samuel Romilly, an act was obtained for making the real estates of persons, who at their death were traders within the meaning of the bankrupt laws, assets for the payment of all their debts, whether by

(*h*) *Robinson* v. *Tonge*, 3 P. Wms. 401.

(*i*) *Brown's case*, 4 Rep. 22 a.

(*k*) *Heir of Cannon* v. *Patch*, 6 Vin. Abr. tit. Copyhold (O. e).

simple contract or by specialty (*l*). This act is in the same language as the more comprehensive statute of 3 & 4 Will. IV. c. 104, hereinafter referred to, except that it is confined to traders. This act was, however, repealed and re-enacted by the Consolidating Act of the 11 Geo. IV. & 1 Will. IV. c. 47. The act 3 & 4 Will. & Mary, c. 14, above referred to, was also repealed at the same time, and its provisions re-enacted. And it was further provided, that if, in any suit for the payment of debts to which the heir was liable, a court of equity should decree the estates liable to such debts to be sold for their satisfaction, and, by reason of the infancy of the heir, an immediate conveyance thereof could not be compelled, the court should direct, and, if necessary, compel the infant to convey the same; and every such conveyance was rendered as effectual as if the infant had then been of age (*m*). This provision was, by a subsequent statute, extended to authorize courts of equity to direct mortgages as well as sales to be made of the estates of the infant heir (*n*). And by a still more recent statute (*o*), the provisions of the act of Will. IV. are extended to any case in which any lands of any deceased person shall, by descent or otherwise than by devise, be vested in the heir or co-heirs of such person, subject to an executory devise over in favour of a person or persons not existing or not ascertained.

Stat. 11 Geo. IV. & 1 Will. IV. c. 47.

Infant heir.

Mortgages.

At length the full relief to creditors, which had been so long resisted, was granted without opposition. The stat. 3 & 4 Will. IV. c. 104 (29th August, 1833), sometimes called Sir John Romilly's Act, enacts, that from and after the passing of that act, when any person shall die seised of or entitled to any estate or interest in lands,

Stat. 3 & 4 Will. IV. c. 104.

(*l*) Stat. 47 Geo. III., sess. 2, c. 74.

(*m*) Sect. 11.

(*n*) Stat. 2 & 3 Vict. c. 60.

(*o*) Stat. 11 & 12 Vict. c. 87, occasioned apparently by the decision in *Heming* v. *Archer*, 7 Beav. 515.

tenements or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold or copyhold, *which he shall not by his last will have charged with or devised subject to the payment of his debts*, the same shall be assets to be administered in courts of equity for the payment of the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs-at-law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs-at-law, devisee or devisees, of any person or persons who died seised of freehold estates, was or were, before the passing of the act, liable to in respect of such freehold estates at the suit of creditors by specialty, in which the heirs were bound. Provided always, that in the administration of assets by courts of equity under and by virtue of the act, all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them, before any of the creditors by simple contract, or by specialty in which the heirs are not bound, shall be paid any part of their demands.

The two clauses distinct.

On the construction of this statute it has been held, that the two clauses which it contains are distinct from one another, and that the first general enactment, making all lands of which a person shall die seised assets, is not controlled by the clause which follows, giving a remedy in equity against the heir-at-law. Consequently, where a person died without heirs, it was held that his lands were assets for the payment of his debts, as against the lord claiming the lands by escheat (*p*). On the same principle, it is held that a suit for the satisfaction of the creditors need not necessarily be instituted by one of the creditors, but may be commenced by any

(*p*) *Evans* v. *Brown*, 5 Beav. 114.

person interested (*q*). The principle of these decisions appears to govern the case to which we have alluded (*r*), of the descent of a reversion. As any estate or interest of which a person dies seised is now assets for the payment of his debts, it follows that the debts of a mesne heir ought now to be satisfied out of lands which descend on his decease, in addition to the debts of the purchaser, from whom the descent is traced. This point is important; for, under the present law of inheritance, the descent of all estates, whether in possession or reversion, is traced from the purchaser (*s*).

Mesne heir.

It has also been held that, as by the act the lands are made assets for the payment of the debts of the deceased, the creditors have now such an interest in the lands as will not be defeated by judgments entered up against the heir for his own debts prior to any suit by the creditors (*t*). Even should the heir create an equitable charge on the lands by deposit of the title deeds, it has been held that this will not defeat the right of the creditors of the ancestor (*u*).

Judgments against the heir.

Equitable charge.

It has also been held, in accordance with the plain language of the last clause in the act (and also, as we have seen (*x*), in accordance with the law as it stood before the act), that an equity of redemption is now legal assets, that is to say, the creditors by specialty in which the heirs are bound are to be paid the full amount of their debts before any of the creditors by simple contract or by specialty, in which the heirs are not

Equity of redemption on mortgage in fee.

(*q*) *Dinning* v. *Henderson*, 2 Collier, 330; *Price* v. *Price*, 15 Sim. 484; *Rodney* v. *Rodney*, 16 Sim. 307.

(*r*) *Ante*, p. 18.

(*s*) See, however, *Muggleton* v. *Barnett*, 1 Hurl. & Norm. 282; 2 Hurl. & Norm. 653, qu. ?

(*t*) *Kinderley* v. *Jervis*, 22 Beav. 1.

(*u*) *Carter* v. *Sanders*, 2 Drew. 248.

(*x*) *Ante*, p. 21.

bound, shall be paid any part of their demands (*y*). Advowsons and copyhold estates are also plainly included within the act. And under the term "just debts" are comprised all liabilities which may result out of obligations entered into by the deceased during his life (*z*).

No priority between specialties when heir not bound and simple contracts.

It will be observed that the act is silent as to any priority between creditors by specialty, in which the heirs are not bound, and simple contract creditors. In the payment of debts out of personal estate, a specialty debt, whether binding the heir or not, must be paid in full before a simple contract debt (*a*). This doctrine apparently arose from the respect which the law formerly entertained for any writing under seal. As, however, the act is silent on the subject, it has been held that in the payment of debts out of real estate, under this statute, both these classes of creditors shall be paid rateably (*b*).

Mortgagee may tack a simple contract debt.

It has also been decided that as all hereditaments are now assets for the payment of all debts, a mortgagee even of copyholds may tack a simple contract debt to his mortgage as against the customary heir or a devisee (*c*). The heir or devisee is now liable to all debts; and as he could not formerly redeem a mortgage without also paying off a bond debt, so now he cannot redeem a mortgage without also paying off any other debt due to the mortgagee. But this rule is not to prejudice other creditors, against whom, if they interfere, the mortgagee cannot tack any debt to his mortgage, but must come in, as to that debt, rateably with the other creditors of the same degree.

(*y*) *Foster* v. *Handley*, 15 Jur. 73; 1 Sim. N. S. 200.

(*z*) *Re Hamer's Devisees*, 2 De Gex, M. & G. 366.

(*a*) *Ante*, p. 9.

(*b*) *Cummins* v. *Cummins*, 3 Jo. & Lat. 64, 90.

(*c*) *Rolfe* v. *Chester*, 20 Beav. 610.

Personal estate primarily liable.

It is well known that the general personal estate of a deceased person is liable in the hands of his executor or administrator to the payment of all his debts according to their legal order of priority. The liability which the law imposed upon the heir to pay specialties in which he was expressly bound, was always considered to be auxiliary only to the primary liability of the general personal estate of the deceased. And, by parity of reasoning, the primary liability of the general personal estate to pay all debts, is not affected by the stat. 3 & 4 Will. IV. c. 104, by which all hereditaments are made assets for the payment of all kinds of debts. The consequence of this rule was, that, if the deceased had mortgaged his lands in his lifetime, the heir had a right to call upon the executor or administrator to pay the mortgage debt out of the general personal estate, and thus to exonerate the lands from the mortgage (*d*).

New enactment.

A recent act, however, to which we shall hereafter more particularly refer, has altered the rule in this respect (*e*). By this act, whenever any person shall die intestate after the 31st December, 1854, his heir is not entitled to have the mortgage debt satisfied out of the personal estate, but the lands mortgaged are, as between the heir and executor or administrator, made primarily liable to the charge. The act contains a proviso, that nothing therein contained shall affect the rights of any person claiming under any will, deed or document of prior date. It has been held that neither the fact of the mortgage being of prior date (*f*), nor the fact that the personalty has been bequeathed by a will of prior date (*g*), is sufficient to exonerate the heir by force of this proviso.

(*d*) See *Bond* v. *England*, 2 Kay & J. 44, which compare with *Swainson* v. *Swainson*, 6 De Gex, M. & G. 648.

(*e*) Stat. 17 & 18 Vict. c. 113, commonly called Locke King's Act.

(*f*) *Piper* v. *Piper*, 1 John. & H. 91.

(*g*) *Power* v. *Power*, 8 Ir. Cha. Rep. 340.

CHAPTER III.

OF A DEVISE NOT CHARGED WITH DEBTS.

We have observed that the power of devising lands by will away from the heir, enabled persons to defeat their specialty creditors, to whom they had given securities binding their heirs. The hardship thus imposed upon specialty creditors after a while attracted the attention of the legislature; and in the reign of William and Mary, an act was passed for the relief of creditors against fraudulent devises (*a*). By this act it is enacted, that all wills and testamentary appointments of any lands whereof any person shall be seised or have power to dispose by will, shall be void as against creditors by bond or specialty in which the heirs have been bound (*b*). And an action of debt is given to every such creditor against the heir and devisees jointly (*c*). But it is provided that, where there has been any devise or disposition of any lands for the raising and payment of any real and just debt or debts, or for portions for children under any marriage contract in writing, the same shall be in full force (*d*). It is further provided, that every devisee made liable by the act shall be chargeable in the same manner as the heir at law by force of the act, notwithstanding the lands devised to him should be aliened before the action was brought.

Stat. 3 & 4 Will. & Mary, c. 14.

It will be observed that the statute provides, that the

(*a*) Stat. 3 & 4 Will. & Mary, c. 14, repealed and re-enacted by stat. 11 Geo. IV. & 1 Will. IV. c. 47.

(*b*) Sect. 2.

(*c*) Sect. 3.

(*d*) Sect. 4.

action of debt shall be brought against the heir and devisees jointly, so that their liability under the act would seem to have been equal. It was however decided that, where a man devised part of his land and left other part to descend to his heir at law, the descended land should be first applied, in order that the intention of the testator as to the part devised might the more fully be carried into effect. Lord Hardwicke at first decided in favour of the heir; but a twelvemonth afterwards he reversed his own decision, manfully saying that he was not ashamed of doing it, for he always thought it was a much greater reproach to a Judge to continue in his error, than to retract it (*e*). And since that time the rule has continued uniform, that lands descended to the heir shall be applied in payment of the debts to which they are liable in priority to lands devised (*f*). If, however, the testator should have expressly appropriated certain lands for the payment of his debts, as by devising them to trustees in fee or for a term of years upon an express trust for payment, or by ordering them to be sold for that purpose, these lands, being thus expressly appropriated, will be first applied, before the lands which have descended to the heir (*g*). This, however, is evidently not in opposition to the testator's intention, but expressly in pursuance of it. Again, prior to the act for the amendment of the law of inheritance (*h*), a devise to an heir without changing the tenure or quality of the lands, was considered inoperative to break the descent, although the testator might have charged them with debts or other incumbrances (*i*). The heir still took as heir. It was however held, in favour of the intention, that, if the testator specifically devised real estates to his heir at law, the heir should

Lord Hardwicke reverses his own decision.

Lands descended primarily liable.

Lands expressly appropriated.

Devise to heir.

(*e*) *Galton* v. *Handcock*, 2 Atk. 424, 439.

(*f*) *Newhouse* v. *Smith*, 2 Sm. & Giff. 344.

(*g*) *Powis* v. *Corbet*, 3 Atk. 556.

(*h*) Stat. 3 & 4 Will. IV. c. 106.

(*i*) Watkins on Descents, 229, 4th ed.

not be primarily liable in respect of those estates, as he would have been, had they simply descended upon him without any devise (*k*). Here, again, the intention was regarded. The testator intended that his heir should have the lands, and, out of respect to that intention, the law placed him, in respect of debts, on the same footing as the other devisees. Since the act to amend the law of inheritance, a devise to the heir renders him a purchaser, and, as such, places him in the same position in all respects as any other devisee (*l*).

Residuary devisee.

An attempt was made to carry the principle of intention a little further. If a testator devised certain of his real estates specifically to one person, and all the residue of his real estates to another person, it was attempted in favour of the presumed intention to throw the debts primarily on the residuary devisee. This attempt, however, did not succeed. Under the law, as it stood prior to the Wills Act (*m*), every devise of land was, in fact, specific; for a testator, prior to that act, could only devise such real estates as he was seised of at the time of making his will. If, therefore, he devised a farm to A. and all the residue of his lands to B., the one devise was in reality as specific as the other. It was accordingly held by Lord Cottenham that both should stand upon the same footing (*n*). His Lordship observed (*o*), "When a testator gives the residue of his personal estate, he knows that it will be uncertain till his death what will be comprised in that gift. But it is certain that the gift will operate upon part only of what he may be possessed of at his death, all debts, funeral expenses, and other charges being to be paid out of it; and the expression necessarily imports what will remain

***Mirehouse* v. *Scaife*.**

(*k*) *Biedermann* v. *Seymour*, 3 Beav. 368.

(*l*) *Strickland* v. *Strickland*, 10 Sim. 374.

(*m*) 7 Will. IV. & 1 Vict. c. 26.

(*n*) *Mirehouse* v. *Scaife*, 2 Myl. & Cr. 695.

(*o*) 2 Myl. & Cr. 706.

after all charges are defrayed. On the other hand, the testator *knows precisely upon what real estates such a gift will operate* unless there be charges affecting the land beyond what the personal estate can satisfy." This decision appears to be correct; though there is a difference between the language of a specific and a residuary devise, which Lord Chancellor Cowper formerly considered might make a difference (*p*).

The act of William and Mary placed the devisee in the same position as the heir, so far as all creditors by specialty binding the heir were concerned, provided such specialty creditors could bring an *action of debt* against the heir. But as the act mentioned actions of debt only, and was silent as to actions of covenant, it was held in *Wilson* v. *Knubley* (*q*), that where the specialty was of such a nature that an action of debt could not be brought upon it, but only an action of covenant to recover damages for breach of a covenant, the devisee was not liable to any action. To remedy this, the Consolidating Act of 11 Geo. IV. & 1 Will. IV. c. 47, to which we have before referred, repealed the statute of William and Mary, and re-enacted its provisions extending them to actions of debt *or covenant*. Again, the act of William and Mary gave the creditor a right of action against the heir and devisees jointly. If, however, the debtor left no heir, it was held that no action could be brought (*r*). To remedy this evil, the Consolidating Act further provides, that if there shall be no heir at law, the creditor may maintain his action of debt or covenant, as the case may be, against the devisee or devisees solely (*s*).

Extension to actions of covenant.

If no heir action against devisee only.

The statute of Geo. III., by which the lands of deceased

(*p*) *Long* v. *Short*, 1 P. Wms. 404.

(*q*) 7 East, 128.

(*r*) *Hunting* v. *Sheldrake*, 9 Mee. & Wels. 256.

(*s*) Stat. 11 Geo. IV. & 1 Will. IV. c. 47, s. 4.

traders were rendered assets for the payment of their debts (*t*), extended to all the hereditaments of the trader whether devised or descended, which he should not by his last will have charged with or devised subject to the payment of the debts. This enactment was repeated in the Consolidating Act (*u*). The eleventh section of that act, which enables infant heirs to convey (*x*), extends also to devises, and so does the act which empowers mortgages to be made as well as sales (*y*). And it has been decided that an infant tenant in tail is thereby enabled to convey by the order of the court, in a suit for payment of debts (*z*). The act further provides (*a*), that where any hereditaments are devised in settlement by any person whose estate under that act, or by law, or by his will, shall be liable to the payment of any of his debts, and by such devise shall be vested in any person for life, or other limited interest, with any remainder, limitation or gift over which may not be vested, or may be vested in some person or persons from whom a conveyance of the same cannot be obtained, or by way of executory devise, and a decree shall be made for the sale thereof for the payment of such debts or any of them, it shall be lawful for the court, by whom such decree shall be made, to direct any such tenant for life or other person having a limited interest, or the first executory devisee thereof, to convey, release, assign, surrender, or otherwise assure the fee simple, or other the whole interest so to be sold, to the purchaser, or in such manner as the court shall think proper. And by a subsequent statute, mortgages as well as sales are authorized to be made

Infant tenant in tail.

Tenant for life empowered to convey on sale by court to pay debts.

Mortgages may be made.

(*t*) Stat. 47 Geo. III., sess. 2, c. 74.

(*u*) Stat. 11 Geo. IV. & 1 Will. IV. c. 47, s. 9.

(*x*) *Ante*, p. 23.

(*y*) Stat. 2 & 3 Vict. c. 60. *Ante*, p. 23.

(*z*) *Radcliffe* v. *Eccles*, 1 Keen, 130; *Penny* v. *Pretor*, 9 Sim. 135.

(*a*) Sect. 12. *Walker* v. *Aston*, 14 Sim. 87.

in the above cases, and also in cases where the tenant for life, or other person having a limited interest, or the first executory devisee is an infant (*b*).

The act of 3 & 4 Will. IV. c. 104 (*c*), extends, as will be observed, to all cases where the person dying shall not by his last will have charged his lands with, or devised them subject to, the payment of his debts. All devised hereditaments whatsoever, including copyholds, are, therefore, subject to its provisions, unless charged with the debts by the will. It has accordingly been held, that, since this statute, the 12th section of the Consolidating Act of 11 Geo. IV. & 1 Will. IV. c. 47, enables the tenant for life of a copyhold estate to surrender and convey the customary fee simple of the same estate, which, though not charged with debts by the will, had, by virtue of the former act, been rendered assets for the payment of debts (*d*).

All devised lands now subject to all debts.

The most important provision for facilitating sales is, however, contained in the act to extend the provisions of the Trustee Act, 1850 (*e*). This act provides, that when any decree or order shall have been made by any court of equity, directing the sale of any lands for any purpose whatever, every person seised or possessed of such lands, or entitled to a contingent right therein, being a party to the suit or proceeding in which such decree or order shall have been made, and bound thereby, or being otherwise bound by such decree or order, shall be deemed to be so seised, or possessed, or entitled (as the case may be), upon a trust within the meaning of the Trustee Act, 1850 (*f*); and in every such case, it shall be lawful for the Court of Chancery,

Trustee Act extension.

(*b*) Stat. 2 & 3 Vict. c. 60.
(*c*) *Ante*, p. 23.
(*d*) *Branch* v. *Browne*, 2 De Gex & Sm. 299.
(*e*) Stat. 15 & 16 Vict. c. 55, s. 1.
(*f*) Stat. 13 & 14 Vict. c. 60.

if the said court shall think it expedient, for the purpose of carrying such sale into effect, to make an order vesting such lands, or any part thereof, for such estate as the court shall think fit, either in any purchaser, or in such other person as the court shall direct; and every such order shall have the same effect as if such person so seised, or possessed, or entitled, had been free from all disability, and had duly executed all proper conveyances and assignments of such lands for such estate.

This provision is here referred to as being an important practical auxiliary in the payment of debts, though it is not the intention of the present Essay to enter into the minutiæ of Chancery practice. To return to the principles involved in our subject, all estates, we have seen, whether devised or not, are now liable to debts. In favour of intention it was, however, held, that the liability of a devisee should be postponed to that of the heir-at-law. But as every devise was then specific, a specific devisee was not preferred to one whose gift was in language residuary (*g*). The act to amend the law with respect to wills (*h*), however, now provides, that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will (*i*). And it further provides that, unless a contrary intention shall appear by the will, such real estate or interest therein, as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail, or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking

The Wills Act.

(*g*) *Mirehouse* v. *Scaife*, 2 Myl. & Cr. 695.

(*h*) 7 Will. IV. & 1 Vict. c. 26.

(*i*) Sect. 24.

effect, shall be included in the residuary devise, if any, contained in such will (*k*). This enactment has given rise to an extraordinary conflict of opinion with regard to the liabilities of a specific and residuary devisee to the debts of the testator under a will made since the act (*l*). The question, however, appears to be one of intention. The act of William and Mary gave no indication of a desire on the part of the legislature to prefer the devisee to the heir; and yet, in favour of the testator's intention, such a preference was made. It may therefore be admitted that no trace of an intention to alter priorities can be discerned in any of the acts of parliament. A testator must be presumed to know the law. If he now specifically devise a farm to A., he must be presumed to wish that A. should get that farm. If he devise the residue of his real estate to B., he must be presumed to wish that B. should take more or less according to the chapter of accidents. The intention in favour of the latter does not therefore seem to be so precise and pointed as the intention in favour of the former. The reasoning of Lord Cottenham in *Mire-house* v. *Scaife* (*m*), now applies in favour of the specific devisee. The testator now does *not know* precisely upon what real estates his residuary devise will operate. It is submitted, therefore, with great deference to the learned Judges by whom the contrary opinion has been held, that, in favour of the testator's apparent intention, a specific devisee ought to be exonerated from the payment of the debts, as against the devisee, the devise in whose favour is merely residuary. The law with regard to personal estate now seems to afford an

Liabilities of specific and residuary devisees.

(*k*) Sect. 25.

(*l*) On the one side, *Emuss* v. *Smith*, V. C. K. Bruce, 2 De Gex & Sm. 735; *Edwards* v. *Pugh*, V. C. Wood, 2 Jarm. on Wills, 527, 2nd ed.; *Eddels* v. *Johnson*, 1 Giff. 22; *Pearmain* v. *Twiss*, V. C. Stuart, 2 Giff. 130; in favour of rateable liability. And on the other, *Dady* v. *Hartridge*, V. C. Kindersley, 32 Law Times, 7; and *Rotheram* v. *Rotheram*, 26 Beav. 465, Sir J. Romilly, M. R.

(*m*) 2 Myl. & Cr. 706.

Residuary devise how held specific. Hensman v Fryer. 3 Ch. 420

analogy which, before the Wills Act, did not exist. A specific legatee takes his legacy clear of debts, so long as the residuary personal estate is able to pay them. The intention in favour of the former is clear; the latter is only to have what is left. A residuary devisee may now take lapsed and void devises, as well as property acquired after the date of the will. The looseness of the general expression in his favour is not now controlled by the straitness of the law.

Locke King's Act.

An important addition to the burdens of the devisee has been made by the recent statute of 17 & 18 Vict. c. 113, commonly called Locke King's Act. This act enacts, that when any person shall, after the 31st of December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments, which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not by his will or deed or other document have signified any contrary or other intention, the heir or devisee, to whom such land or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person; but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged; every part thereof according to its value bearing a proportionate part of the mortgage debts charged on the whole thereof. Provided that nothing therein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise. Provided, also, that nothing therein contained shall affect the rights of any

30. 31. Vic. c. 69.

Contrary intention signified where Testor owned two Estates. Conveyed in one Mortge. and specifically devised one and left the other to pass by residy devise Brownson v Lawrance 6 Ly. 1
But see hows. Gibbins v Eyden 7 Ly. 371.

person claiming under or by virtue of any will, deed or document made before the first of January, 1855.

It has been held that the general language of the former part of this act is not narrowed by the latter part, and that the devisee must bear the burden of the mortgage, although the bequest of the personal estate be void (*n*). It has also been held that mere equitable charges by deposit of title deeds are charges by way of mortgage within the meaning of the act (*o*). But the question, what is to be deemed a contrary or other intention within the meaning of the act, has already given rise to conflicting decisions. In the case of *Woolstonecroft* v. *Woolstonecroft* (*p*), it was decided by V. C. Stuart, that a direction by the testator that his debts should be paid by his executors out of his estate was a sufficient expression of an intention that a mortgage debt, to which part of the real and leasehold estates was subject, should not be primarily charged thereon. This decision was however reversed on appeal by the present Lord Chancellor (*q*). His Lordship was of opinion that the words used by the testator were not sufficiently express to take the case out of the operation of the act, and that as the mortgaged land is now the primary fund for payment, as clear an expression of an intention to exempt it is required, as would be required to exempt the general personal estate from its primary liability to pay other debts (*r*). It may, however, perhaps be questionable whether the primary liability of the personal estate does not rest on grounds of general convenience and ancient usage, which are hardly analogous to an anomalous primary liability imposed by a modern statute. And the opinion of the

Equitable charges.

Contrary intention.

Woolstonecroft v. *Woolstonecroft.*

(*n*) *Dacre* v. *Patrickson*, 1 Drew. & Sm. 186, 190.

(*o*) *Pembrooke* v. *Friend*, 1 Johns. & Hemm. 132.

(*p*) 2 Giff. 192.

(*q*) *Woolstonecroft* v. *Woolstonecroft*, 9 Weekly Rep. 42.

(*r*) See *post*, Chap. VII.

Heir taking capital decree does not claim under the will
Nelson v Page 7 Ves 25

learned Vice-Chancellor appears to be shared by other Judges (*s*). But see now 30. 31. sec. c. 69.

Power of appointment.

It will be remembered that personal estate over which a testator has merely a general power of appointment has long been held liable to the payment of his debts (should the power be exercised) after his own personal estate shall have been exhausted (*t*). The statute of 3 & 4 William and Mary expressly comprised real estate over which the testator had a power of appointment (*u*). The statute of 3 & 4 Will. IV. c. 104, speaks only of any estate or interest in real estate of or to which any person shall die seised or entitled (*v*). It has however been held, that if a testator exercise a general power of appointment over real estate, such real estate will, by virtue of the latter statute, be liable to all his debts, whether by specialty or simple contract; though in analogy to the rule as to personal estate, the real property appointed will not be applied to the payment of his debts until all the testator's own property, whether real or personal, shall have been first exhausted (*x*). This is one of those judicial stretches of unelastic words on which the bystander looks with approbation, out of respect of the good which may come. It might have been held that the framer of the latter statute, having the former before him, purposely omitted to mention appointments, which the former statute as purposely comprised. It does not appear to have been decided whether personal estate appointed under a power shall be applied before real estate so appointed, or whether they shall both be applied rateably. It is presumed that they would both be rateably applied.

(*s*) *Stone* v. *Parker*, 1 Drew. & Sm. 212; *Townshend* v. *Mostyn*, 26 Beav. 72, 76; *Smith* v. *Smith*, 10 Irish Ch. Rep. 89, 98.

(*t*) *Ante*, p. 12.

(*u*) *Ante*, p. 28.

(*v*) *Ante*, p. 28.

(*x*) *Fleming* v. *Buchanan*, 3 De Gex, M. & G. 976.

Arcade v Mayer 1 Mer Ju. 564
Elliot v Merryman 1 Mer Ju. 561.

CHAPTER IV.

OF A TRUST TO PAY DEBTS.

THE parliamentary provisions to which we have referred provide for all cases in which the deceased shall not by his will have charged his lands with, or devised them subject to, the payment of his debts. We have seen that, if the lands be not charged, then, whether they descend or are devised, creditors by specialty in which the heirs are bound are preferred to creditors by specialty in which the heirs are not bound, who, in payment out of real estate, rank only with creditors by simple contract (*a*). If, however, the lands be devised subject to or charged with the payment of debts, then all creditors come in rateably, according to the rule that equality is equity. Hence arises this curious result, that the debtor, after having entered into bonds binding his heir, may at his own pleasure place his creditors who hold bonds on the same footing with those who have none. He has only to charge his real estate with the payment of his debts. In former days, when a man who "muddled away his property in paying small debts" was not always the more respected for so doing, creditors were glad to be paid at all. But at the present day it seems singular that if priority is to be admitted, it should not always be enforced. The reason, it will be perceived, is historical. The legislature interfered only where no trust or charge for payment of debts had been created by the testator. Where such a trust or charge was created, equity distributed the proceeds

Debtor may himself vary priorities.

(*a*) *Ante*, p. 26.

equally. The parliamentary remedy gives a priority to creditors having specialties binding the heir.

Trust for payment of debts.

There is a great difference between a trust for the payment of debts out of real estate, and a mere charge of them on that estate. When a trust is created, the conscience of the trustee is affected; the creditor is put under his care, and it becomes the especial duty of the trustee to look after him. It has accordingly been held that no lapse of time can bar the right of the creditor, when a trust has been created (*b*). "It is not," said Sir T. Plumer, in *Hughes* v. *Wynne* (*c*), "to be inferred that a man has no debt, because he does not go to law to enforce payment, when he has a trustee to pay him." It was always the rule of equity that as between trustee and *cestui que trust* no length of time could be a bar (*d*). And the legislature at length put this rule into a definite shape by the Statute of Limitations passed at the recommendation of the Real Property Commissioners (*e*). This act provides (*f*) that, when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of the act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him. And it has been decided that a trust for raising a sum of money (*g*), or an annuity (*h*), or the

Time does not bar.

Stat. 3 & 4 Will. IV. c. 27, s. 25.

(*b*) *Hughes* v. *Wynne*, Turn. & Russ. 307; *Crallan* v. *Oulton*, 3 Beav. 1; *Bentley* v. *Robinson*, 10 Ir. Cha. Rep. 287.

(*c*) Turn. & Russ. 309.

(*d*) *Townshend* v. *Townshend*, 1 Cox, 29, 34.

(*e*) See their First Report, pp. 48, 49.

(*f*) Stat. 3 & 4 Will. IV. c. 27, s. 25.

(*g*) *Young* v. *Lord Waterpark*, 13 Sim. 204; *Blair* v. *Nugent*, 3 Jo. & Lat. 658; *Watson* v. *Saul*, 1 Giff. 188.

(*h*) *Cox* v. *Dolman*, 2 De Gex, M. & G. 592; *Snow* v. *Booth*, 2 Kay & J. 132; *Lewis* v. *Duncombe*, M. R., 9 W. Rep. 446.

debts of a testator (*i*), is an express trust within the meaning of this statute. But here, again, opposite opinions may be found (*j*), in consequence of confusing two things which are distinct from one another, namely, a trust and a charge.

Trust of personalty to pay debts, the statutes of limitations run.

An apparent exception to this rule occurs in the case of personal estate. If a testator bequeath his personal estate upon any express trust for payment of his debts, the statutes of limitations still run against the creditors. This rule, however, which was not established without the usual conflict of opinion (*k*), proceeds upon this ground, that the personal estate is by law primarily liable to the payment of the debts, and that a testator, by creating such a trust, merely does that which the law already requires. In excluding a creditor by force of the statutes of limitations, equity in this case merely follows the law, and carries its principles into execution (*l*).

Legatees barred by statute;

It is true, also, that every legatee, whether specific, pecuniary or residuary, stands toward the executor in the position of a *cestui que trust;* and in case of intestacy, the next of kin hold the same relation to the administrator; yet all these persons are barred by the statutes of limitations after twenty years. This, however, is by express enactment. The statute 3 & 4 Will. IV. c. 27, s. 40, bars any legacy after twenty years; and this has been decided to include both legacies payable out of the personal estate (*m*), and also residuary bequests of the personalty (*n*). And the right of the next of kin is barred

(*i*) *Dillon* v. *Cruise*, 3 Ir. Eq. Rep. 70; *Jacquet* v. *Jacquet*, 27 Beav. 332; *Bentley* v. *Robinson*, *ubi sup.*

(*j*) *Lord St. John* v. *Boughton*, 9 Sim. 219, 223.

(*k*) *Scott* v. *Jones*, 4 Cl. & Finn. 382, reversing the decision of Lord Brougham, 1 Russ. & Myl. 255, who had reversed that of Sir John Leach; *Freake* v. *Cranefeldt*, 3 Myl. & Cr. 499; *Evans* v. *Tweedy*, 1 Beav. 55.

(*l*) See *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 630.

(*m*) *Sheppard* v. *Duke*, 9 Sim. 567; *Piggott* v. *Jefferson*, 12 Sim. 26, qu.?

(*n*) *Prior* v. *Horniblow*, 2 You. & Coll. 200; *Adams* v. *Barry*, 2 Coll. 290.

after the like period by a much more recent statute (*o*). Before these statutes the law was otherwise (*p*), although length of time afforded a natural presumption of payment (*q*), or the legatee might be barred by his own laches (*r*). And even since these statutes, if a legacy becomes severed from the rest of the assets, and held by the executor upon an express trust, the statute will be of no avail in his favor against the claim of his *cestui que trust* (*s*).

but legacy held on trust is not barred.

Both a charge of debts and a trust for their payment include all liabilities for damages for breach of covenant or otherwise, to which the estate of the testator may be liable (*t*), although neither of them can revive a debt which, at the time of the testator's decease, was already barred by the statute of limitations (*u*). Whether the testator create a charge only, or a trust, the creditors whose debts are not already barred, have an equal right to be paid. There is this difference however. If a trust be created, time will not run against the creditors; but if they have merely a charge, they must look after themselves; and if they neglect to do so, they will be barred after twenty years by the statute of limitations. The enactment by which this bar is effected, is contained in the same clause with that by which legacies are barred after the like period (*x*). There is, however, this noteworthy difference. Before the statute, time, as we have seen, did not run as between the executor and the legatee (*y*); but where the claim was for a charge

Debt already barred not revived by trust or charge.

A charge barred after twenty years.

A difference between legacies and charges.

(*o*) Stat. 23 & 24 Vict. c. 38, s. 13.

(*p*) *Anon.*, 2 Freem. 22, pl. 20; *Parker* v. *Ash*, 1 Vern. 256.

(*q*) 1 Fonblanque on Equity, 332.

(*r*) *Portlock* v. *Gardner*, V. C. Wigram, 6 Jur. 795.

(*s*) *Phillipo* v. *Munnings*, 2 Myl. & Cr. 309; *Dinsdale* v. *Dudding*, 1 You. & Coll. N. C. 265.

(*t*) *Morse* v. *Tucker*, 5 Hare, 79; *Eardley* v. *Owen*, 10 Beav. 572; *Bermingham* v. *Burke*, 2 Jo. & Lat. 699.

(*u*) *Burke* v. *Jones*, 2 Ves. & Bea. 275; *Hargreaves* v. *Michell*, 6 Madd. 326.

(*x*) Stat. 3 & 4 Will. IV. c. 27, s. 40.

(*y*) *Ante*, p. 42.

only, or any other equitable interest affecting land, courts of equity generally refused to interfere after a lapse of twenty years. They followed the analogy of the then existing statute of James (*z*). The statute of William IV., therefore, whilst it altered the law with respect to legacies, merely gave distinctness and statutory authority to that which was already the rule with respect to charges (*a*). The act provides (*b*) that no action, suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same; unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action, suit or proceeding shall be brought, but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given. It has been decided that this enactment applies to a charge by a testator of his debts on his real estate (*c*).

Stat. 3 & 4 Will. IV. c. 27, s. 40.

There is another important difference between a trust and a charge. Lands devised subject to a trust for the payment of debts are applied towards their payment before lands which may have descended to the heir, whilst lands which are merely charged with debts are not taken, until those, which may have de-

Lands subject to a trust applied before lands descended, lands charged after.

(*z*) Stat. 21 Jas. I. c. 16. See 2 Jac. & Walk. 175; Mitford on Pleadings, 318, 5th ed.

(*a*) First Report of Real Property Commissioners, pp. 48, 49.

(*b*) Stat. 3 & 4 Will. IV. c. 27, s. 40.

(*c*) *Dundas* v. *Blake*, 11 Ir. Eq. Rep. 138; *Jacquet* v. *Jacquet*, 27 Beav. 332.

scended to the heir, shall have been exhausted (*d*). In *Harmood* v. *Oglander*, Lord Eldon remarked that, as he understood the law, it was decided that in the administration of assets ordinarily the first fund applicable is the personal estate not specifically bequeathed; then land devised for the payment of debts, not merely charged, but *devised or ordered to be sold;* then descended estates; then land *charged with the payment of debts.*

Trust for payment of debts.

It becomes important, therefore, to ascertain in what cases land is subject to a trust for the payment of debts, and when it is merely charged. In many cases there is no difficulty. If the lands are devised to trustees in fee or for a term of years upon trust, either by sale or by mortgage, or out of the rents and profits, to pay the debts, this is clearly a trust (*e*); and lands so situated must be sold, before either lands which descend to the heir, or lands merely charged with debts, can be resorted to. In some cases, indeed, there has been no contest of this nature as to priorities; the question has simply been, whether or not the lands are liable; and cases, which appear to be more strictly cases of trust, seem sometimes to have been inadvertently classed with those which are cases of mere charge. Thus, if a man directs that his debts shall be paid by his executors, and afterwards devises real estate to them, whether beneficially or upon a trust, it is held, that the lands so devised are liable to his debts (*f*). It is submitted, however, that this, though often spoken of as creating a charge (*g*), is in fact an instance of a trust. Certain persons are fixed upon, to whom the lands are given,

Direction to executors to pay, who are also devisees.

(*d*) *Harmood* v. *Oglander*, 8 Ves. 106, 124.

(*e*) *Powis* v. *Corbet*, 3 Atkins, 556; *Tweedale* v. *Coventry*, 1 Bro. C. C. 240; *Manning* v. *Spooner*, 3 Ves. 114; *Hughes* v. *Wynne*, T. & Russ. 307.

(*f*) *Barker* v. *Duke of Devonshire*, 3 Meriv. 310; *Henvell* v. *Whitaker*, 3 Russ. 343; *Dover* v. *Gregory*, 10 Sim. 393; *Dormay* v. *Borradaile*, 10 Beav. 263; *Hartland* v. *Murrell*, 27 Beav. 204.

(*g*) See 2 Jarm. on Wills, 525, *et seq.*, 1st ed., 508, *et seq.*, 2nd ed.

and who are expressly directed to pay the debts, as part of the duties which they have to perform. Thus, in *Wathins* v. *Cheek* (*h*), the testator, Richard Walker, subject to the payment of his debts, testamentary expenses and legacies, *which he desired might be paid by his executrix*, immediately after his decease, gave all his real and personal estate to his wife for ever, and appointed her sole executrix of his will. A mortgage of the real estate was made many years afterwards by the widow, and her third husband, Mr. Cheek, under circumstances which, in the opinion of the court, showed that the money so raised could not possibly have been applied in payment of the charges created by the will. "The question is," said Sir John Leach, V. C. (*i*), "whether the transactions in question did not afford intrinsic evidence that the mortgages to the defendant were not made by Cheek and wife, in order to pay the charges created on the estate by the will of the testator Walker, but for other purposes, *which amounted to a breach of trust.*" Again, in *Henvell* v. *Whitaker* (*k*), the testator, after first directing that all his just debts and funeral expenses should be fully paid and satisfied *by his executor* thereinafter named, gave all his real estate to his nephew William Whitaker, whom he appointed executor of his will: the same learned Judge, then Master of the Rolls, in his judgment (*l*) says, "When the testator in his will directs that all his just debts and funeral expenses be fully paid by his executor thereinafter named, it must be intended that he had then fully determined who that executor should be, and the will is to be construed as if he had said, 'I direct that my just debts and funeral expenses be fully paid and satisfied *by my nephew William Whitaker*, whom I hereinafter name my executor.' In such case, the obligation to pay his debts and funeral expenses

Watkins v. *Cheek.*

Henvell v. *Whitaker.*

(*h*) 2 Sim. & Stu. 199.
(*i*) *Ibid.* 205.
(*k*) 3 Russ. 343.
(*l*) *Ibid.* 347.

would be *a condition imposed upon the nephew* William Whitaker, to be satisfied as far as all the property which he derived under the will would extend, whether personal or real. This principle will reconcile all the authorities, and will be of ready application in future cases." So, in *Harris* v. *Watkins* (*m*), the Vice-Chancellor Wood considered that a direction by a testator that his debts should be paid by his executor, imposes upon the executor the duty of paying those debts to the extent of any property that may be devised to him.

Harris v. *Watkins.*

Finch v. *Hattersley.*

Executrix tenant for life of the real estate.

There is a case of *Finch* v. *Hattersley* (*n*), which appears at variance with this doctrine, inasmuch as there the executrix was made tenant for life only of the real estate, with remainders over, and it was held that a direction that the debts should be paid by the executrix, operated as a charge of the debts upon the whole of the real estates, both for the wife's life estate, and also in remainder after her decease. This case, however, as is remarked by Mr. Jarman (*o*), was decided when the doctrine upon this subject was more lax, and the distinctions less defined, than at present; and in the recent case of *Cook* v. *Dawson* (*p*), the Lord Justice Turner remarked, that this case had been questioned, and in fact *Cook* v. *Dawson* (*q*), may now be considered as having overruled it. There is an older case, where the real estate was devised to the defendant and the heirs of his body, with a remainder over, and it was held that a direction to the defendant, who was also executor, to pay the debts, amounted to a charge of the debts on the real estate (*r*). This was in 1686; the court decreed both real and per-

Now overruled.

Clowdsley v. *Pelham.*

Devise to executor in tail.

(*m*) Kay, 438. See also *Bentley* v. *Robinson*, 10 Ir. Cha. Rep. 287.

(*n*) 3 Russ. 345, n.

(*o*) 2 Jarm. on Wills, 527, 1st ed., 510, 2nd ed.

(*p*) Lords Justices, 21st March, 1861.

(*q*) Rolls, 7 Jur. N. S. 130, affirmed on appeal.

(*r*) *Clowdsley* v. *Pelham*, 1 Vern. 411.

sonal estate to be sold for payment of the debts. At this time, lands subject to the payment of debts were considered to be legal assets, and distributable by the executor along with the personalty. This circumstance accounts for the decree, and in some degree detracts from the value of the decision on the general question. It is submitted that, if in this case the debts are charged, it can only be in consequence of the devisee being a trustee of the whole inheritance, over which, as tenant in tail, he has a disposing power by barring the entail. It will be observed that the bill was against the tenant in tail, and it might have been held otherwise had it been brought against the remainderman after the decease of the tenant in tail without issue.

Devise to a person, he paying the debts.

Again, if lands should be given to a person, he paying the debts, or on condition that he pay the debts, this, though insufficient to exonerate the general personal estate (*s*), appears to have all the properties of a trust (*t*). The devisee, as devisee, is told to pay the debts, his conscience is affected, and he accordingly becomes a trustee for that purpose. In the case of *Dillon* v. *Cruise* (*u*), there appears some discrepancy between the will as stated in the beginning of the report, and as referred to in the judgment of the Lord Chancellor of Ireland. The Lord Chancellor said (*x*), "The testator devises his estate to his wife, his three sons and two daughters, to be divided between them, after payment of his debts which he had in a previous part of his will directed to be paid, so that it is not merely a devise subject to debts, nor a devise charged with debts, but he directs the debts to be paid in the first instance. It is not merely the ordinary case of a party devising his

Dillon v. *Cruise.*

(*s*) *Bridgeman* v. *Dove*, 3 Atk. 201.

(*t*) *Dolton* v. *Hewen*, 6 Madd. 9; *Page* v. *Adam*, 4 Beav. 269; *Lockhart* v. *Hardy*, 9 Beav. 379.

(*u*) 3 Ir. Eq. Rep. 70.

(*x*) *Ibid.* 79.

property subject to his debts, but the testator here gives precise and special directions, with respect to the payment of them, and devises in such a form as to *impose upon the devisees* the obligation of making the actual payment of them before they can derive any benefit from his property." In this case the court accordingly held that there was an express trust for the payment of the creditors, and that the creditor was not barred after twenty years by the statute of limitations. This case is referred to by the court in *Dundas* v. *Blake* (*y*), and is explained to have been decided on the ground that there was an express trust, and not merely on the ground of its being a simple charge, as would certainly appear from the commencement of the report. The distinction seems simple, though its application is not always easy. Where any person is named, and the duty of paying the debts is imposed upon him by the testator, then there is a trust; but where the lands merely are charged, then there is no trust.

Power to sell for payment of debts.

Again, if a testator give power to his trustees (*z*), or to his executors (*a*), to sell any particular portion of his real estate for payment of his debts, this is tantamount to a trust for that purpose, and places the lands so situated in the same relative position as lands devised upon an express trust for payment of debts. So if, instead of confining the sale to a part, the testator empowers or directs the whole of his real estate to be sold for the payment of his debts, the same effect must necessarily follow. And if the testator, while clearly directing a sale, does not so clearly express by whom it is to be made, yet, if it can be collected from the context that he intended certain persons to sell, such persons will be trustees accordingly, and will have not only the power but also the duty cast upon them of effecting

(*y*) 11 Ir. Eq. Rep. 138, 151.
(*z*) *Coxe* v. *Bassett*, 3 Ves. 155.
(*a*) *Bateman* v. *Bateman*, 1 Atk. 421.

a sale (*b*). It is apprehended that the produce of lands so sold would be applicable to the payment of debts before any lands, which may have descended to the heir (*c*), and that the statute of limitations would not run against the creditors, who might, at any time after the decease of the testator, insist upon a sale, if not already made.

Proceeds applicable before lands descended.

The statute would not run.

A *cestui que trust* is the peculiar favourite of the courts of equity; in taking care of him, however, they seem occasionally to have displayed something, if it may be said, approaching to a little fussiness. A trustee is a person who is trusted; and the courts have undoubtedly been perfectly right in looking, as they do, somewhat sharply after him. An over-cautious doctrine, however, long prevailed that, if a trustee for sale had to pay over the purchase-money to other persons in given shares, the purchaser was bound to see that the trustee applied the purchase-money accordingly (*d*). The trustee was considered as not to be trusted, and the purchaser, unless he looked after him, was himself responsible for the misapplication of the money. To remedy this evil, conveyancers inserted in every settlement and will a clause to the effect that the receipts of the trustees should be sufficient discharges. This insertion of course somewhat lengthened the instrument, though the length thus added would scarcely appear to have been the most striking result of the doctrine in question. An act, however, was recently passed with a view, as expressed in the preamble, of dispensing with the necessity of inserting in terms certain provisions usually inserted in settle-

Seeing to application of purchase-money.

Receipt clause.

(*b*) *Ward* v. *Devon*, 11 Sim. 160; *Forbes* v. *Peacock*, 11 Sim. 152, 11 Mee. & Wels. 630; *Gosling* v. *Carter*, 1 Coll. 644.

(*c*) *Harmood* v. *Oglander*, 8 Ves. 124.

(*d*) *Lloyd* v. *Baldwin*, 1 Ves. sen. 173; Sugd. V. & P. 541, 13th ed.

New enactment.

Trustees' receipts are now sufficient discharges.

ments, mortgages, wills and other instruments (*d*). This act enacts (*e*) that the receipts in writing of any trustees or trustee for any money payable to them or him, by reason or in exercise of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such monies from seeing to the application thereof, or from being answerable for any loss or misapplication thereof. An act of the previous session (*f*) had similarly provided that every instrument creating a trust should be deemed to contain those clauses for the indemnity and reimbursement of trustees, which conveyancers had been in the habit of inserting in deeds for the comfort of trustees, rather than for their protection. The act of last session, under cover of shortening deeds, alters long-established principles of equity, and is, in fact, a satire on the previous doctrines of the court which enforced them. A more beneficial alteration has, however, seldom been made.

Indemnity and reimbursement clauses.

Exception when trust to pay debts.

An exception to the rule we have referred to, was made in the case of a trust or power created for the payment of the debts of a testator. This arose from the practical impossibility of obliging a purchaser to go into the accounts of the testator's estate, and to see what debts, if any, remained unpaid, and to whom they might be due. Wherever, therefore, there was any trust for the payment of debts, courts of equity made an exception to their usual rule, and held that the purchaser might pay his money to the trustee for sale, and was exonerated by his receipt for it, without looking further to its application (*g*). And this was

The trustees' receipt held sufficient.

(*d*) Stat. 23 & 24 Vict. c. 145. s. 31.
(*e*) Sect. 29.
(*f*) Stat. 22 & 23 Vict. c. 35,
(*g*) Sugd. V. & P. 541, 13th ed.

sanctioned also by the courts of law (*h*). It was further held, that the purchaser was not bound to inquire of the vendor whether or not any debts remained unpaid; and further, that if such a question were asked, the vendor was not obliged to answer it (*i*). "The case," says Lord St. Leonards, in *Stroughill* v. *Anstey* (*k*), "stands on the ground that, when a testator by his will charges his estate with debts and legacies, he shows that he means *to entrust his trustees with the power of receiving the money*, anticipating that there will be debts, and thus providing for the payment of them. It is by implication a declaration by the testator that he intends to entrust the trustees with the receipt and application of the money, and not to throw any obligation at all upon the purchaser or mortgagee. That intention does not cease because there are no debts; it remains just as much if there are no debts, as if there are debts, because the power arises from the circumstance that the debts are provided for, there being, *in the very creation of the trust*, a clear indication, amounting to a declaration by the testator, that he means, and the nature of the trust shows that he means, that the trustees are alone to receive the money and apply it. In that way all the cases are reconcileable, and all stand upon one footing, namely, that *if a trust be created* for the payment of debts and legacies, the purchaser or mortgagee shall in no case be bound to see to the application of the money raised."

Purchaser not bound to inquire if debts unpaid.

A testator sometimes creates a mixed fund, by directing the whole of his real and personal estate to be sold, and his debts and legacies to be paid out of the common produce; or, which is the same thing, by directing

A mixed fund.

(*h*) *King* v. *Shrives*, 10 Bing. 238.

(*i*) *Forbes* v. *Peacock*, 1 Phill. 717; *Stroughill* v. *Anstey*, 1 De Gex, M. & G. 635.

(*k*) 1 De Gex, M. & G. 653.

his real estates to be sold, and the produce to be considered as part of his personal estate, and then directing payment of his debts and legacies out of the common fund thus formed. When this is done, it sometimes happens, either by the omission of the testator to dispose of the surplus, or by the decease of the legatee of the surplus, or of part thereof, in the testator's lifetime, that there is a partial intestacy. The surplus of the money to arise from the personal estate then belongs to the testator's next of kin, and the surplus to arise from his real estate belongs to his heir-at-law. In cases of this sort it is now settled, after much conflict of opinion, that, out of regard to the intention of the testator, the personal estate shall not, *as between the heir and next of kin*, be primarily liable to the payment of his debts; but that the debts shall be apportioned rateably between the produce of the real and personal estate (*l*). This rule, however, by no means affects the priorities of creditors who may choose to rely on the personal estate only; nor does it affect the equal rights of all of them to participate in the produce of the real estate. The personal estate is still legal assets, and the real estate is still equitable assets. Accordingly, in *Barker* v. *May* (*m*), a testator devised lands to his executors in fee upon trust to sell, and directed that the money to arise from the sale, as well as the rents and profits of the lands until sale, should be deemed part of his personal estate, and subject to the same dispositions; he then directed his personal estate to be sold, and bequeathed several legacies out of the collected produce of the whole. It was held that the remedy of the legatees, so far as respected the produce of the real estate, was in equity only. "Here," said Lord Tenterden (*n*), "the

Real and personal estate rateably liable;

but personal estate still legal and real estate equitable assets.

Barker v. *May.*

(*l*) 2 Jarm. on Wills. 529, 2nd ed.; *Roberts* v. *Walker*, 1 Russ. & Myl. 752; *Simmons* v. *Rose*, 6 De Gex, M. & G. 411.

(*m*) 9 Barn. & Cress. 489.

(*n*) *Ibid.* 494.

executors are trustees of the money arising from the sale of the land; the money constitutes equitable and not legal assets. It is quite clear the testator cannot alter the legal character of the property by directing that it shall be considered part of his personal estate." So, if the testator, instead of devising his real estate to his executors upon trust to sell, had merely given them a power to sell it for the same purpose, the effect would have been the same. The mixture of the funds would, as between the parties interested, have rendered the debts rateably apportionable between the produce of each; but, as regards the creditors, the character of each fund would still have been preserved; the personal estate would still have been legal assets, and the real estate, or its produce, would still have been equitable assets.

A mixed fund.

Where a mixture of this sort takes place, it is evidently most desirable that the same persons should have the control of both kinds of estates; that the executors of the personalty should also be the trustees of the realty. Accordingly, in cases of this sort, if there be any doubt who is to sell the real estate, this duty will be considered as falling by implication upon the executors (*o*). The mixture of the two funds by the testator is, however, a necessary condition. Thus, in *Bentham* v. *Wiltshire* (*p*), the testator devised certain specific real estate to one Hannah Barrett for life, and directed that after her decease the estate should be sold (without saying by whom), and the money arising from the sale be disposed of amongst certain persons, and appointed Brian Bentham and Hannah Barrett his executors. Sir John Leach, V. C., held that the executors did not take, by implication, any power to sell the particular real estate thus devised. He remarked,

Power by implication to executors to sell.

Funds must be mixed.

Bentham v. *Wiltshire.*

Funds not mixed.

(*o*) *Ward* v. *Devon*, 11 Sim. 160; *Tylden* v. *Hyde*, 2 Sim. & Stu. 238.

(*p*) 4 Madd. 44. See also *Curtis* v. *Fulbrook*, 8 Hare, 25, 278.

"To enable executors to sell, the power must either expressly be given to them, *or necessarily be implied from the produce being to pass through their hands in the execution of their office, as in payment of debts and legacies;* but here the executors have nothing to do with the produce of the sale, nor any power of distribution with respect to it (*q*)." In contrast with this case stands that of *Ward* v. *Devon* (*r*), where the whole will was as follows:—"*Sell all off*, both real and personal property, and divide the produce between my wife Mary Ann Ward and my sons and daughters, each to share alike. The law gives the house at Teddington to the youngest son; but *it is my will to sell all.* I appoint Mr. Robert Ward, my brother and my wife Mary Ann Ward, my executors." Here it was held that the executors took by implication a power to sell the real estate. The produce of the whole property, both real and personal, was mixed up together, and although the testator did not actually say that his executors were to sell his real estate, no one can read the will without feeling certain that such was his intention. On the authority of this case, a similar decision was arrived at in the similar case of *Forbes* v. *Peacock* (*s*). The testator first directed his debts to be paid, then gave a freehold house and garden to his wife for life, with liberty to sell it, and at her death directed the residue of his estate to be collected, and the house and garden, if not previously sold, to be then disposed of, and the produce divided amongst several persons. It was held that the executors took by implication power to sell the house and garden on the decease of the widow. The whole produce of both realty and personalty was mixed up together; and it would have been extremely inconvenient if the legatees had been obliged to go to the

Ward v. *Devon.* Funds mixed.

Forbes v. *Peacock.* Funds mixed.

(*q*) 4 Madd. 49. See also *Pitt* v. *Pelham*, 1 Ch. Cas. 176; 1 Levinz, 804.

(*r*) 11 Sim. 160.

(*s*) 11 Sim. 152. See also *Tylden* v. *Hyde*, 2 Sim. & Stu. 238.

executors for the rateable share of their legacies payable out of the personalty, and to other persons for the rateable balance of the same sums payable out of the real estate. These cases have been stated at length, as a misapprehension of their principle appears, as we shall hereafter see, to have given rise to serious errors, which are in danger of becoming law.

Direction to pay debts & legacies a both followed by a general devise of real Estate charges the real Estate. Re Bellis Jr. 5 Pl. R. 5-04

Elliot v Merryman cas
1 Wh. & Tu. 5-1.

CHAPTER V.

OF A CHARGE OF DEBTS.

A charge of debts differs from a trust.

A CHARGE of debts is, as we have seen, a very different thing from a trust for their payment. The testator, who charges his debts on his real estate, desires merely to be honest, and to pay his debts, but does not impose upon any trustee a special duty to look after his creditors. The creditors consequently must look after themselves, and if they should not do so, they will be barred after twenty years by the Statute of Limitations (*a*). Again, lands subject to a trust must, as we have seen (*b*), be applied in payment of debts, before those which descend to the heir; whereas lands which are merely charged with debts, are not resorted to, until the descended lands shall have been exhausted. In either case, however, should the lands be resorted to, the produce arising is equitable assets, and, as such, ought to be distributed among all the creditors equally. This rule was not established in the case of a mere charge until after much conflict of opinion. If a man merely charged his lands with the payment of his debts, and then allowed them to descend to his heir, it was contended, on behalf of creditors by specialty binding the heir, that, the descent not having been broken, the heir was by law in the first place liable to satisfy them; and thus in fact it was at first decided (*c*). The contrary, however, was ultimately decided by Lord Eldon (*d*), on

The produce is equitable assets.

Bailey v. *Ekins.*

(*a*) *Dundas* v. *Blake*, 11 Ir. Eq. Rep. 138; Sugd. Real Prop. Stat. 107.; *Jacquet* v. *Jacquet*, 27 Beav. 382; *ante*, p. 43.

(*b*) *Ante*, p. 43.

(*c*) *Fremoult* v. *Dedire*, 1 P. Wms. 430. See *ante*, p. 20.

(*d*) *Bailey* v. *Ekins*, 7 Ves. 318.

the ground that, so far as the creditors were concerned, a charge of debts included all, and gave all an equal right of payment, a charge being *in this respect* tantamount to a trust. It was to this point that his Lordship was addressing himself, when he made the remark, that he was confident Lord Thurlow's opinion was, that a charge was a devise of the estate in substance and effect *pro tanto*, in trust to pay the debts. This appears by his subsequent remarks: "A mere charge is no legal interest. *It is not a devise to any one*, but that declaration of intention upon which a court of equity will fasten, and by virtue of which they will draw out of the mass going to the heir, or to others, that quantum of interest, which will be sufficient for the debts, and then, getting it into their hands, the only inquiry will be, whether the statute interposes to make it fraudulent against specialty creditors." This case was followed by *Shiphard* v. *Lutwidge* (*e*), and the remarks of Mr. *Romilly* and Mr. *Bell*, the counsel for the specialty creditors in that case, show what was then the main point of *Bailey* v. *Ekins*. They declined after that decision to argue the point, but observed that the Statute of Fraudulent Devises meant to leave the priority of creditors exactly as before, intending no alteration, except where there was a devise without a provision for debts. The specialty creditors, they remarked, advanced their money upon the credit of the real estate. The simple contract creditors, however, claimed an equal participation in the charge, and their claim was admitted. But Lord Eldon, while thus asserting the claims of all creditors under such a charge, never meant to assert, as seems sometimes supposed, that the heir taking by descent was a trustee in the same sense in which a devisee in trust for sale is a trustee. In fact it is obvious that a testator does not

Shiphard v. *Lutwidge.*

When lands descend subject to a charge, the heir is not a trustee.

(*e*) 8 Ves. 26.

know, when he makes his will, who his heir may be, when he dies. By making a mere charge, the heir is not strictly constituted a trustee, though the simple contract creditors have as much right to be paid out of the lands, as if he were one. Lord Eldon explains this in *King* v. *Denison* (*f*), where he says that a devise of a real estate to A., and his heirs, charged with debts, is a devise of an estate of inheritance, for the purpose of giving the devisee a beneficial interest *subject to* a particular purpose, whilst a devise upon trust to pay debts is a devise *for* a particular purpose. It must be admitted that the remarks of Lord St. Leonards, in the case of *The Commissioners of Charitable Donations* v. *Wybrants* (*g*), appear, at first sight, to be opposed to this view of the case. It seems, however, that his remarks on this subject, on a former occasion, had been misunderstood; for when, during the argument, his Lordship's remark was cited, that the charge was of itself a trust, he replied (*h*), "I did not use those words in the sense you put on them. I did not decide that, if an estate be devised to A., subject to an annuity to B., A. is a trustee for B." And it is submitted, that his Lordship could not possibly have intended to say that, when lands descend subject to a charge, the heir-at-law is as strictly and properly a trustee, as a trustee appointed by will. In fact, his Lordship's deliberate opinion upon this point appears in his Essay on the Real Property Statutes (*i*), when he says that "a mere charge upon land for one person *or for a class*, with a devise of the land, subject to the charge to another, does not create a trust in the devisee of the land, so as to prevent time running against it as a mere charge," and amongst the authorities cited by his Lordship, in support of this proposition, will be found

King v. *Denison.*

Opinion of Lord St. Leonards.

(*f*) 1 Ves. & Bea. 272. See also *per* V. C. Stuart, in *Watson* v. *Saul*, 1 Giff. 198.

(*g*) 2 Jo. & Lat. 197.

(*h*) *Ibid.* 191.

(*i*) Page 107.

the case of *Dundas* v. *Blake* (*k*), in which it was expressly decided that a devise of lands, subject to a mere charge of debts, does not create a trust for the creditors, within the 25th section of the Statute of Limitations (*l*).

Ogden v. *Lowry*.

It was decided in a recent case (*m*), that a mere charge of debts was sufficient to create a trust, within the meaning of the 47th section of the Act to amend the Practice and Course of Proceeding in the High Court of Chancery (*n*). This section enacts, that any person claiming to be a creditor, or interested under the will of a testator, may obtain a summary order for the administration of his real estate, where the whole of such real estate is by devise vested in trustees, who are by the will empowered to sell such real estate, and authorized to give receipts for the rents and profits thereof, and for the produce of the sale of such real estate. This appears to be one of many instances where of late years principle has been sacrificed to convenience. If one were called on to define a trust, as distinguished from a charge, it would be difficult to do so more emphatically than in the words of the above section.

Statute 15 & 16 Vict. c. 86, s. 47.

General direction to pay debts operates as a charge.

It will be remembered that, prior to the 29th August, 1833, the lands of a deceased person were not liable to his simple contract debts, unless he chose to make them so. The courts were therefore laudably astute, in the construction of wills, to make general expressions of desire by the testator that his debts should be paid, operate as charges of his debts upon his real estate. It was accordingly held that, if the testator set out by directing that his just debts should be paid, this

(*k*) 11 Ir. Eq. Rep. 138.

(*l*) Stat. 3 & 4 Will. IV. c. 27, *ante*, p. 40.

(*m*) *Ogden* v. *Lowry*, V. C. Kindersley, 25 L. J. Chan. 198; 4 W. R. 156.

(*n*) Stat. 15 & 16 Vict. c. 86.

operated as a charge of the debts on the real estate (*o*); and although some stress was formerly laid on the testator's *first* directing his debts to be paid, yet afterwards the direction alone was held to be sufficient. Thus, in *Graves* v. *Graves* (*p*), Sir L. Shadwell remarked, "I do not think that the charge is made to rest on the mere circumstance that the testator has used the words *imprimis* in the first place: for, if a testator directs his debts to be paid, is it not in effect a direction that his debts shall be paid in the first instance?" If, however, the testator directed that his debts should be paid *by his executors*, and did not at the same time devise his real estates to them, this of course could not be held to charge the real estate (*q*). The executors, as such, have nothing to do with the real estate; and a direction that they shall pay the debts, evidently implies only that they shall pay them out of the funds, which by law come to them for that purpose. "I cannot," said Sir R. P. Arden, Master of the Rolls, in *Keeling* v. *Brown* (*r*), a case of this sort,—"I cannot, with all the disposition I always feel to give such a construction to wills as shall make testators honest, construe this into a charge upon the real estate. It would be a violence to all language, and making a will for the testator; not construing or executing that which he has made." So, if real estate should be devised by the testator to one only of his executors, a direction that his debts shall be paid *by his executors*, will not operate to charge with the debts that part of his real estate which he has devised to one of them only (*s*). And again, if real estate be devised to a sole executor for his life only, and not in fee simple, it has, as we have seen, been decided

Direction that debts shall be paid by executors.

Devise to one executor only.

Devise to executor for life.

(*o*) 2 Jarm. on Wills. 497, *et seq.*, 2nd ed.

(*p*) 8 Sim. 55.

(*q*) *Keeling* v. *Brown*, 5 Ves. 359; *Powell* v. *Robins*, 7 Ves. 209; *Wisden* v. *Wisden*, 2 Sm. & Giff. 396.

(*r*) 5 Ves. 359, 361.

(*s*) *Warren* v. *Davies*, 2 Myl. & K. 49.

that a direction by the testator that his debts shall be paid by his executor, does not operate to charge the debts on this mere life estate (*t*). If, however, the testator directs that his debts shall be paid by his executor, and then goes on to devise real estate to him in fee, this, as we have seen (*u*), amounts to more than a mere charge: the executor then becomes a person entrusted with the satisfaction of the debts out of the property devised to him, and a trust for payment of the debts is accordingly created.

Devise to executor in fee.

A charge of debts is nothing more than a charge on the land of a number of sums of money of uncertain amount, and its nature may perhaps be made more clear by first considering a charge on land of a single sum. If a sum of money be charged on land, the owner of the land has, in a certain sense, a duty of paying that sum out of the land; and the owner of the money has a right to oblige him to do so, by filing a bill in Chancery against him. At the same time the owner of the land is not a trustee, and the owner of the money is not a *cestui que trust.* But if land be vested in a person as trustee, upon trust simply to raise and pay thereout to another a sum of money, a different relation is immediately constituted; the legal owner of the land is a trustee, the owner of the money is a *cestui que trust.* If now the trustee were to sell this land, the purchaser would, by the recent statute to which we have before alluded (*x*), be exonerated from seeing to the application of his purchase-money. For that statute expressly provides, that the receipts in writing of any trustee for any money payable to him by

Nature of a charge of debts.

Charge of a single sum.

Trust to raise a sum.

Purchaser is now exonerated.

(*t*) *Doe* d. *Ashby* v. *Baines*, 2 Cr. M. & R. 23; *Harris* v. *Watkins*, Kay, 438, 447; *Cook* v. *Dawson*, Rolls, 7 Jur. N. S. 130, affirmed on appeal, *ante*, p. 46.

(*u*) *Ante*, p. 44.

(*x*) Stat. 23 & 24 Vict. c. 145, s. 29, *ante*, p. 50.

Otherwise as to a charge.

reason of any trusts, shall be sufficient discharges. But if, in the former case of a mere charge, the owner of the land subject to the charge were disposed to sell, it is clear that the purchaser, having notice of the charge, would be bound to see it paid off. The statute we have referred to does not apply to the owner, for he is not a

Power to sell.

trustee. Again, if a person be invested with a mere power to sell lands in order to raise a certain sum, he is a trustee for the person entitled to the money; and as the act we have spoken of extend to monies payable to trustees in the exercise of powers vested in them, a

Purchaser now exonerated.

purchaser under the power would not now be bound to see to the application of his purchase-money. There is thus an essential difference between a mere charge and a trust or a power to sell in order to raise a sum of money. The same difference exists, whether one sum or many sums be chargeable or directed to be raised. We have seen, however, that although equity, before the recent act, required the purchaser to look to the application of his money when specific sums were directed to be raised, yet that, in the case of a trust or power, an exception was made when the debts of a testator generally were charged upon the lands subject to the trust or power (*y*); it was considered practically impossible to implicate the purchaser in the accounts necessary to carry such a requisition into effect. The same reason obviously occurs in the case of a mere charge. Where specific sums only are charged, the

When debts charged generally, purchaser not bound to see his money applied.

purchaser of the lands must still at his peril see that those charges are duly paid (*z*); but, where the charge is of debts generally, it has been long held, from the necessity of the case, that the purchaser is under no such obligation (*a*). The same rule, which applies to a

(*y*) *Ante*, p. 50.

(*z*) Except, perhaps, in the case provided for by stat. 22 & 23 Vict. c. 35, ss. 14 and 16, *post*.

(*a*) Sugd. V. & P. 541, 13th ed.

purchaser, extends also to a mortgagee, who is a purchaser *pro tanto* (*b*). Mortgagee.

In accordance with the principles above laid down, it is clear that, if a testator charges his lands with legacies merely, and not with debts, a purchaser of these lands is bound to see to the payment of the legacies (*c*); and the recent act of 23 & 24 Vict. c. 145, s. 29, does not apply to this case, if no trust or power to sell be created by the will or by any statute. We shall hereafter see that in certain cases a recent statute creates such a power (*d*). But if the testator should charge his lands with both debts and legacies, or even with debts and annuities, it is held that a purchaser of the lands so charged, is not bound to see to the payment of the legacies and annuities (*e*); for, not being bound to see to the discharge of debts, he cannot be expected to see to the discharge of legacies or annuities, which cannot be paid till after the debts (*f*). The purchaser, moreover, is not bound to inquire whether or not the debts have been paid. The rule applies to the state of things as it existed at the death of the testator, and it is impossible to prove the negative that no debts actually remain unpaid (*g*). If, however, the purchaser be distinctly made aware that no part of his purchase-money is in fact to be applied in payment of debts, there seems no reason why, in the case of a mere charge, any more than in the case of a trust, he should not be bound to see to the payment of the legacies and annuities.

Charge of legacies merely.

Charge of debts and legacies or annuities.

The purchaser need not inquire if debts are paid.

(*b*) *Ball* v. *Harris*, 4 Myl. & Cr. 264; *Eland* v. *Eland*, 4 Myl. & Cr. 426.

(*c*) *Horn* v. *Horn*, 2 Sim. & Stu. 448.

(*d*) Stat. 22 & 23 Vict. c. 35, ss. 14—18, *post*.

(*e*) Sugd. V. & P. 541, 543.

(*f*) *Jebb* v. *Abbott*, Co. Litt. 290 b, n. 1, s. xiv. 3; *Page* v. *Adam*, 4 Beav. 269.

(*g*) *Johnson* v. *Kennett*, 3 Myl. & Keen, 624; Sugd. V. & P. 544, 13th ed.

Remarks of Messrs. Hayes and Christie.

On this subject two eminent conveyancers (*h*) have made the following remarks:—"Down to a late period, it was undoubtedly the understanding of conveyancers (and this statement is not made unadvisedly), that if the ownership or dominion, by whatever means acquired, was vested in A., subject to a general *charge* of debts and legacies (as distinguished from a *trust* for payment of debts and legacies), at whatever period created, a purchaser from A. was within the protection of the rule which exonerates purchasers from seeing to the application of the purchase-money; so that if, for example, the land was simply charged with debts and legacies, and so charged devised to A. in fee, beneficially, and A. made an ante-nuptial, or even a voluntary settlement, with power of sale in trustees, who sold to B., the benefit of the rule extended itself to B." The learned author, in whose work these remarks appear, avows, however (*i*), that he is unable to adopt them to their full extent, remarking, that if the purchaser pays his money under circumstances which would, in the opinion of a court of equity, fix him with actual notice that no part of it will in fact be applied in payment of debts, (whether the necessity for such application do or do not exist), his claim of exemption from liability appears to rest on an unsatisfactory foundation. To this, so far, the present author fully accedes. He cannot, however, see that such a proposition is at all at variance with the doctrine laid down by the above-named eminent lawyers.

So far, then, the whole doctrine appears to rest upon plain and simple principles. A charge is not a trust, though in some sense it imposes a duty. Specific sums charged must ordinarily be paid at the peril of any

(*h*) Messrs. Hayes and Christie, Dart's V. & P. 476, 3rd ed.

(*i*) Dart's V. & P. 477.

person interested in the property; but debts generally charged form an exception, when money is raised either by sale or mortgage, on account of the practical impossibility of obliging the purchaser or mortgagee to see them paid. This, and this only, makes the difference. In other respects a charge of debts is just like a charge of any other sum or sums of money. It is accordingly held, that the fact of a will containing a mere charge of debts, does not influence its construction, if, upon the language, a doubt arise, whether the trustees thereby appointed, take any, and what interest, in the legal estate. Thus, in *Kenrick* v. *Lord Beauclerk* (*k*), a testator as to his real and personal estate, subject to, and chargeable with, his just debts and funeral expenses, gave, devised and bequeathed the same to trustees and their heirs, to the intent that they should, in the first place, apply his personal estate in payment of his debts, funeral expenses, and legacies; and as to all his real estates, *subject to his debts*, and such charges as he might think proper to make, he devised the same to his cousin, Richard Price, for life, with remainders over. It was contended that the devise to the trustees, coupled with the charge of debts, imposed on them the duty of paying the debts, and consequently gave them the legal estate. But it was held that the trustees took no estate under the will, and that the tenant for life took the legal estate in the lands devised. Lord Alvanley, in delivering the judgment of the court, remarked as follows:—" Unless it appears manifestly that the testator intended that the trustees should be active in paying the debts, the legal estate will not vest in them. The question is, whether there be any such apparent intention on the face of this will? *It would indeed be much more convenient that the legal estate should be vested in trustees for the payment of the*

Charge of debts does not affect construction of will.

Kenrick v. *Lord Beauclerk.*

Lord Alvanley's judgment.

(*k*) 3 Bos. & Pul. 175.

debts, than that the trust should be executed by the devisee under the direction of a court of equity; for a court of equity could not enable the devisee to make a complete title to the estate. But this is only an argument *ab inconvenienti,* from which *we cannot construe the testator to have said what in fact he has not said.* Perhaps, if it had been suggested to him, he would have directed that the payment should be made by the trustees; but he has not done so. This is a mere devise charged with the payment of debts. In disposing of the personal estate, the testator directs the trustees to pay his debts, legacies, and funeral expenses; but in the limitation of the real estate, he does not even say *after* payment of his debts and such charges as he shall make, to the use of the tenant for life, but *subject* to his debts, and such charges as he shall make. Upon these grounds, we are all of opinion, and shall so certify, that the trustees took no legal estate in the premises, but that Richard Price took an estate at law for life, charged with the payment of debts." The authority of this case was recognized by the Court of Queen's Bench in the case of *Doe* d. *Cadogan* v. *Ewart* (*l*), and it is cited in the leading treatise on the law of wills as an authority for the proposition that "the mere fact, that the devised property is charged with debts or legacies, will not vest the legal estate in the trustees, unless they are directed to pay them, or the will contain some other indication of an intention to create a trust for the purpose (*m*). Again, in the often-cited case of *Denn* d. *Moor* v. *Mellor* (*n*), it was held that the existence of a charge of debts could not enlarge to a fee simple a devise which, under the strict words of the will, was held to be a life estate only. Lord Kenyon, after remarking that it would be extremely dangerous to remove those landmarks of real property on which

Denn d. *Moor* v. *Mellor.*

Lord Kenyon's judgment.

(*l*) 7 Ad. & Ell. 636, 668.
(*m*) 2 Jarm. on Wills, 244, 2nd ed.
(*n*) 5 Term Rep. 558.

mankind had acted for such a length of time, goes on to say, "Supposing the devisor had in the beginning of the will charged his debts and funeral expenses on his real estate, and had then, after a series of limitations, devised to his wife in the words now used, it could not have been contended that such a charge on the real estate would have passed the fee to his wife; and if not, the place, in which the same words are introduced, cannot vary the question. I admit that the real estate is charged with the payment of debts and funeral expenses, if the personalty be insufficient for that purpose; but there are no words charging the estate *in the hands of the wife* with the payment of those debts" (*o*).

It must be admitted that in a recent case (*p*) the contrary was decided, and trustees were held to take the legal fee on account of the will having created a preliminary charge of debts. In this case, *Denn* v. *Mellor* (*q*) does not appear to have been cited, and it is respectfully submitted that this decision, opposed as it is by such a mass, both of principle and authority, cannot be considered to have altered the law. *Creaton* v. *Creaton.*

The fact, then, of property being charged either with a single sum, or with many sums, definite or indefinite, does not, by the ordinary rules of law, give to the person possessed of the property subject to the charge, any further estate therein, than he would have had without such charge; *à fortiori* it might be supposed that it would not confer on him or on any other person any power over the property. We now, however, ap-

(*o*) 5 Term Rep. 563. See also 2 Preston on Estates, 243; *Doe* d. *Sams* v. *Garlick*, 14 Mee. & Wels. 698; *Vick* v. *Sueter*, 3 Ell. & Bl. 219; 18 Jur. 625; *Burton* v. *Powers*, 3 Kay & J. 172.

(*p*) *Creaton* v. *Creaton*, 3 Sm. & Giff. 386.

(*q*) 5 Term Rep. 558.

proach a case in which, for the laudable purpose of avoiding a chancery suit, it was held that a charge of debts gave to the trustees of the property charged, who were directed to sell at a given time, the power of selling *before that time*, with the concurrence of the executors, in order to pay the debts. This case is *Shaw* v. *Borrer* (*r*). The ground of the decision appears to have been that, as the court would, on the application of the creditors, compel the trustees to raise the money requisite for payment of the debts, the trustees, at the instance of the executors, might themselves do that, which the court would compel them to do on the application of the creditors. This case has been disapproved of by many eminent real property lawyers (*s*). If the charge of a single sum gives no further power to a trustee of the lands charged, why should the charge of many sums have a different effect? The objection to this case, however, does not seem to be so much in the actual decision of it, as in the doctrines which were advanced in the course of the argument, and which seem to have been to some extent adopted by the court. It was boldly argued on behalf of the vendors, that, where there is a general charge for the payment of debts, and no devise of the real estate, *the executors might sell;* and where there was such a general charge and a devise to trustees, the trustees, upon a deficiency of the personal estate being ascertained, were bound to convey the legal estate *at the direction of the executors* (*t*). Here begins that confusion from which much litigation has already proceeded, and more perhaps may follow. The executors, as such, have nothing whatever to do with land. In *Shaw* v. *Borrer*, it is true, the sale was made at their instance, and one of the executors was also one of the trustees of the property

Shaw v. *Borrer.*

Disapproved by eminent lawyers.

Argument that a charge of debts empowers executors to sell.

The confusion begins.

(*r*) 1 Keen, 559. See Appendix A.

(*s*) Amongst others, by the late Mr. Duval, and by Mr. Hayes.

(*t*) 1 Keen, 570, 571.

sold. And it is plain that the executor must first inform the devisee that the personalty is deficient, before the latter need sell to raise that deficiency. The fact, therefore, that the sale was made at the instance of the executors, was one of no moment. The trustees were the persons who sold, and the only persons who had a right to sell. The argument of the vendor's counsel that the charge empowered the executors to sell,—an argument unsustained by the slightest real authority up to that time,—seems, however, to have made some impression upon the court. The learned Judge remarked in his judgment that he did not think it *very material* that the executors were not parties to the contract personally (*u*). The executors in truth had nothing to do with making the sale (*x*); their office was confined to the distribution of the personalty; and they had no more business to interfere, than the trustee of one estate, primarily liable to a charge, has a right to interfere with the trustee of some other estate, which may be secondarily liable to the same charge. We have seen (*y*) that lands which descend to the heir are liable to the payment of debts before lands which are merely charged. The heir, therefore, must inform the devisee of the lands charged, that the lands descended are insufficient, before the devisee need himself raise the deficiency. Could it be contended, that the heir has authority to direct a sale by the devisee, or to control him in the raising of the money? The heir is as much personally liable to pay the debts to the extent of his assets, as the executor is to the extent of his. Why, then, should not the heir have power to sell the lands devised as well as the executor? The race would be more exciting. Instead of two only running, three would be entered; and he

The trustees sold.

The executors had no right to interfere.

(*u*) 1 Keen, 579. Cas. 905; 3 Jur. N. S. 25.
(*x*) *Colyer* v. *Finch*, 5 H. of L. (*y*) *Ante*, p. 43.

would win the conduct of the sale who should get first to the auction mart (*z*).

Remarks of Messrs. Hayes and Christie.

On this case the two eminent real property lawyers, whom we have already quoted, go on to remark (*a*)—"Nor was it considered at all material whether A. (the devisee), or a stranger, was named as *executor*. As a very great number of titles must have been accepted upon this understanding, there would appear to be some danger in judicially countenancing a different doctrine. Upon a point so important to purchasers, and of such frequent occurrence, it is most desirable that the law should be clear; and it is much to be regretted that the modern decisions should have involved it in considerable uncertainty. That uncertainty may be traced to the case of *Shaw* v. *Borrer*; for, before that decision, there was perhaps hardly any point in respect of which the practice of conveyancers was better settled. There is not any valid reason for indulging, as regards these points, in any greater laxity of construction and implication than is admissible in regard to instruments generally, and much of the difficulty which has arisen would probably have been prevented, and may now be best remedied, by a simple adherence to established rules of construction. No arguments of convenience can warrant a violation of those rules. The whole subject requires to be carefully reviewed and settled upon broad and clear principles, which (as in the instance of the separate estate doctrine), can alone avert a large amount of litigation" (*b*).

(*z*) See *Hodgkinson* v. *Quinn*, 1 Johns. & Hemm. 303; 9 W. R. 197; 7 Jur. N. S. 65.

(*a*) Messrs. Hayes and Christie, *ante*, p. 64. See Dart's V. & P. 477, 3rd ed.

(*b*) See also the Remarks of Mr. Waley, in Davidson's Precedents, Vol. II. p. 837; and of Mr. Badger, in Hayes and Jarman's Concise Forms of Wills, p. 261.

The case of *Shaw* v. *Borrer* was, however, soon followed by that of *Ball* v. *Harris* (*c*). Here, again, there was a general charge of debts, and, subject thereto, a devise to trustees in fee, in trust for several persons in succession. Leatham, one of the trustees, disclaimed, and Harris, the sole acting trustee, deposited the title deeds of the lands, as security for a sum of money advanced to himself and the testator's widow, as executor and executrix of the will; and it was held that the security was good. It will be seen at once by the reader, who has followed the course of argument in the preceding pages, that the executrix ought not to have concurred in the receipt of this money. The money was not legal assets; the executor's business was with the personalty only. The trustee was the person who had to pay the charge; he therefore alone ought to have received the money. However, the trustee alone made the deposit, and the memorandum which he gave, ran as follows:—"I, the undersigned William Harris, *sole acting devisee in trust* of the last will and testament of Richard Perry, deceased, do hereby acknowledge to have deposited the accompanying deeds, &c." Under these circumstances, it would certainly have been hard to hold the charge void by reason only of the concurrence of an unnecessary person in signing the receipt for the money advanced. But beyond this, the decision made does not seem to have carried the law. *Ball* v. *Harris.*

This, however, was not the light in which this case was viewed by an eminent Judge. A few years after occurred the case of *Gosling* v. *Carter* (*d*). In the judgment in this case occurs the following passage (*e*):—"In *Ball* v. *Harris*, the wife was not devisee of the land as Harris was; and, as Leatham had disclaimed, Harris became sole devisee. Harris was also executor. If Dictum in *Gosling* v. *Carter.*

(*c*) 8 Sim. 485; 4 Myl. & Cr. 264.

(*d*) 1 Coll. 644.

(*e*) *Ibid.* 649.

the devisee was the person to sell, Harris would have been the only person to receive the money. If the executors were the persons to sell, then Harris and the widow were the persons to receive the money; and Harris and the widow did receive the money. If payment ought to be made to one, it is not necessarily a good payment to make that payment to one and another; and *Ball* v. *Harris* seems to me to involve the decision that it was the executors who were to sell, and not the devisee." A right, however, to receive the money to arise from an estate when sold, is not the same thing as a right to sell that estate; otherwise every person, having an equitable charge on an estate to the amount of its value, would have a right to sell it. Lord St. Leonards viewed the case in the light of a mortgage made by the trustee, rather than by the executors. In *Stroughill* v. *Anstey*(*f*), he states, with reference to *Ball* v. *Harris*, that the testator first directed his debts to be paid so as to create by implication a charge of the debts upon his real estates; "he then devised his real estates to trustees in fee, upon trust for certain persons successively; *the trustees having mortgaged*, the point raised was, whether they could make a title, &c." And not to take shelter under authority, though it may be admitted that, had *Ball* v. *Harris* stood alone, it might have been capable of the construction which the learned Judge placed upon it, yet viewed in reference to the principles of law, to the distinction between legal and equitable assets, and to the nature of a simple charge of debts, the reader will perhaps agree that the decision itself affords no authority for such a construction. It is a misfortune which seems inevitable that the dicta which fall like crumbs from the table of eminent Judges are carefully gathered up by conscientious reporters, and duly ar-

The opinion of Lord St. Leonards.

(*f*) 1 De Gex, M. & G. 635, 647.

rayed in the larder of the law; and the more eminent the Judge, the greater the evil when a casual expression of passing thoughts is thus made more of than it intrinsically deserves. Few Judges will leave behind them a brighter name than the very eminent Judge whose dictum we have just ventured to criticize. It was with great satisfaction that the author heard the same learned Judge, during the argument on the appeal in *Cook* v. *Dawson* (*g*), express a doubt as to the doctrine that a charge of debts empowers the executor to sell. On the counsel for the appellant assuming that such would be the case if he could establish that there was a charge, the learned Lord Justice remarked to this effect, "The only point on which I have any doubt is that which you take for granted."

Doubts of the Lord Justice Knight Bruce.

In *Gosling* v. *Carter* (*h*), the testator directed, generally, his debts to be paid out of his estate, and then gave every thing to his wife for life, and after his decease he directed that the whole should be sold, and that the receipts of his executor should be a discharge for the purchase-money, and he appointed his wife and W. Gosling executors. The reader will observe that under the will Gosling took only a power as surviving executor to sell the lands *after the wife's decease*, and that the legal estate subject to the wife's life interest, and to Gosling's power, was left to descend to the heir-at-law. Gosling and the wife, however, in her lifetime, sold the lands for payment of the testator's debts, and it was held that the sale was good, but that the purchaser was not bound to take the title without the concurrence of the heir-at-law. This case, therefore, decided no more than that, where there is a charge of debts, a sale may be made with the concurrence of all persons having together the legal estate in the lands. This decision,

Case of *Gosling* v. *Carter*.

(*g*) Lords Justices, Monday, March 18, 1861.

(*h*) 1 Coll. 644.

thus far, merely followed those of *Shaw* v. *Borrer* and *Ball* v. *Harris*, giving to the charge of debts the effect of enabling *the legal owners* of the land to make a sale, when otherwise they could not.

The difficulties occasioned by the above-mentioned cases of *Shaw* v. *Borrer* (*i*) and *Ball* v. *Harris* (*k*), gave rise to a parliamentary enactment which has settled the law on this point for the future. The Act to further amend the Law of Property, and to relieve Trustees (*l*), enacts, that where by any will which shall come into operation after the passing of that act, the testator shall have charged his real estate, or any specific portion thereof, with the payment of his debts, or with the payment of any legacy, or other specific sum of money, and shall have devised the estate so charged *to any trustee or trustees for the whole of his estate or interest therein*, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy or money as aforesaid by a sale and absolute disposition by public auction or private contract of the said hereditaments, or any part thereof, or by a mortgage of the same, or partly in one mode, and partly in the other; and any deed or deeds of mortgage so executed may reserve such rate of interest, and fix such period or periods of repayment as the person or persons executing the same shall think proper. The act further provides (*m*), that the powers thus conferred shall extend to all persons in whom the estate devised, shall, for the time being, be vested by survivorship, descent or devise, or to any person or persons who may be appointed

Stat. 22 & 23 Vict. c. 35.

Trustees under a will subject to a charge may now mortgage or sell.

(*i*) 1 Keen, 559.
(*k*) 4 Myl. & Cr. 264.
(*l*) Stat. 22 & 23 Vict. c. 35, s. 14, 13th August, 1859.
(*m*) Sect. 15.

under any power in the will, or by the Court of Chancery, to succeed to the trusteeship, vested in such devisee or devisees in trust as aforesaid. And purchasers or mortgagees are not to be bound to enquire whether the powers conferred by the act shall have been duly and correctly exercised by the person or persons acting in virtue thereof (*n*). These provisions, however, are not in any way to prejudice or affect any sale or mortgage, then already made, or thereafter to be made, under or in pursuance of any will coming into operation before the passing of the act; but the validity of any such sale or mortgage is to be ascertained and determined in all respects as if the act had not passed, and the several sections above mentioned are not to extend to a devise (meaning apparently a beneficial devise), to any person or persons, in fee or in tail, for the testator's whole estate and interest, charged with debts or legacies, nor, says the act, shall they affect the power of any such devisee or devisees to sell or mortgage, *as he or they may by law now do* (*o*).

Not to extend to previous wills.

These provisions evidently meet such cases as *Shaw* v. *Borrer* (*p*) and *Ball* v. *Harris* (*q*). For the future they render a sale or mortgage by the devisees in trust, under such circumstances as there happened, unquestionably valid. They do not, however, touch such cases as *Gosling* v. *Carter* (*r*). These cases are met by a further enactment in the same statute, as follows:—That if any testator, who shall have created such a charge as is described in the 14th section, shall not have devised the hereditaments charged as aforesaid, in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in such will (if any),

Where the fee is not devised to trustees, the executors may sell.

(*n*) Sect. 17.
(*o*) Sect. 18.
(*p*) 1 Keen, 559.
(*q*) 8 Sim. 485; 4 Myl. & Cr. 264.
(*r*) 1 Coll. 644; *ante*, p. 73.

shall have the same or the like power of raising the said monies, as is thereinbefore vested in the devisee or devisees in trust of the said hereditaments; and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested; but any sale or mortgage under the act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate (*s*). The 17th and 18th sections of the act (*t*) also apply to this provision. This enactment, however, was not solely occasioned by *Gosling* v. *Carter*. This case was followed by other decisions to be mentioned in the next chapter.

(*s*) Sect. 16. (*t*) *Ante*, p. 75.

Elliot v. Merryman
1 Wh. & Tu. 5-7.

CHAPTER VI.

OF IMPLYING A POWER FOR EXECUTORS TO SELL UNDER A CHARGE OF DEBTS.

WE have stated (*a*) that, previously to the case of *Shaw* v. *Borrer* (*b*), there was not the slightest real authority for the proposition, that a mere charge of debts by a testator empowered his executors to sell his real estate. In order to examine the accuracy of this proposition, it will be necessary to look into the cases in which executors have been held to take by implication a power to sell real estate. The first case on this subject is the old case in the Year Books of the time of Henry VII., to which we have already referred (*c*). There, we have seen, three Judges thought that if a man by his will directed lands to be sold, without saying by whom, his executors should take a power of sale by implication. The reason for this opinion, however, was, that the money to arise by the sale was then considered as *legal assets* in the hands of the executors. Now, however, we have seen (*d*), that the monies would be equitable assets and not legal. According to the law as it then stood nothing could be more reasonable. If, however, the money had been then held, as it is now, to be equitable assets, distributable amongst the creditors, not according to their legal priorities, but equally like a charitable dole, the reason would have failed, and with it the law. The dicta dropped by ancient Judges require to be carefully examined; these antique coprolites,

Cases where executors have taken power to sell real estate.

The case in the Year Books.

(*a*) *Ante*, p. 69.
(*b*) 1 Keen, 559.
(*c*) Year Book, 15 Hen. VII., fol. 12; Sugd. on Pow. App. No. 1; *ante*, p. 2.
(*d*) *Ante*, p. 5.

embedded in the Year Books, not unfrequently indicate extinct species of legal points.

Case in Leonard's Reports.

The next case occurred in the time of Queen Elizabeth; but the produce of the sale of real estate was still held to be legal and not equitable assets; this case, therefore, forms part of the same formation as the former. A man devised his lands to his wife for life, and willed that after her death they should be sold, and the money distributed to three of his blood, and made his wife and another his executors. The executors proved the will; the other executor died, and the wife sold the lands, and it was held that the sale was good, "for the monies coming of the sale are to be distributed by his executors to persons certain as legacies, and it appertains to executors to pay the legacies, and therefore they shall sell; as if a man willeth that his lands shall be sold, and that the monies coming thereof shall be disposed of for the payment of his debts, now the executors shall sell the lands, for to them it belongs to pay the debts (*e*)." So, in an anonymous case in the same reign (*f*), a man devised lands to his sister and her heirs for ever, "except out of this general grant my manor of R——, which I do appoint to pay my debts," and made two executors by name, and died; and it was held that a sale by the surviving executor was valid. The reason of the decision is stated to have been, that such was the intention of the testator, and not to relinquish the reversion to his heir, but to trust his executors with the sale of it for the speedy payment of his debts. Now, however, that the produce of the sale of real estate is not legal assets in the hands of the executors, these cases can be no authorities for anything further than that *where the will shows an intention that*

Case in Dyer.

(*e*) 2 Leonard, 220; 1 Sugd. on Pow. 133, 6th ed., 135, 7th ed.

(*f*) Dyer, 371 b, pl. 3.

the executors shall apply the proceeds, there they may, by implication, take a power to sell. The next case appears to be that of *Elton* v. *Harrison* (*g*), where the testatrix gave several legacies to be paid within a year, *if her lands in Norton could be sold*, and gave the residue, after payment of debts and legacies, to the defendant, whom she made her executor; it was held, that the executor had authority to sell. Here a direction to sell the lands in Norton, if not expressed, was plainly implied, and the produce of the whole real and personal estate was mixed up together into a common fund. This case therefore falls within the principle of those to which we have already adverted (*h*), where a mixed fund is created. So in *Blatch* v. *Wilder* (*i*), a testator devised all his real and personal estate to be sold for the payment of his debts, and appointed two persons executors, one of whom alone proved the will; and Lord Chancellor Hardwicke was of opinion that it was a very reasonable construction, that the executor should be the person to make the sale. However, he ordered the heir-at-law to concur in the sale. He further decided, that the money arising from the sale was *legal assets* in the executor's hands, and administrable as such. This latter point, we have seen (*k*), was afterwards overruled. But, as we have also seen, the mixture by the testator of the whole produce of realty and personalty still gives the executor, as in this case, an implied power to sell the real estate. No further case of importance appears to have been decided on this point until the case of *Newton* v. *Bennett* (*l*). In this case the testator, after stating that he was indebted to several persons, and that he was desirous that they should be paid, for the more easy accomplishing the

Elton v. *Harrison.*

Blatch v. *Wilder.*

Newton v. *Bennett.*

(*g*) 2 Swanst. 276, n., 6th June, 28 Charles II., 1676.
(*h*) *Ante*, p. 53.
(*i*) 1 Atk. 419, 3rd May, 1738.
(*k*) *Ante*, p. 5.
(*l*) 1 Brown's C. C. 135, 20th April, 1782. *Ante*, p. 5.

same, desired that all his estates in Kent *should be sold* forthwith, and, after payment of several sums of money, that the remainder might be *vested in his executors* for the payment of his debts. Lord Thurlow held, that the devise in this case was tantamount to giving the executor a power to sell, and apply the money to the payment of debts. He referred to the cases in Dyer and Leonard's Reports already mentioned, stating that they were stronger than the present case, where there is rather an express intention that the estate shall be sold and the debts paid, than a devise to sell. He held, however, that the proceeds of the sale were equitable, and not legal assets. In this case the fact, that the proceeds of the sale which the testator directed, were directed to be vested in the executors, was an ample ground for holding them, in the absence of any express devise, to be entitled to sell by implication. The next case was *Ward* v. *Devon* (*m*), to which we have already adverted, and which was the case of a mixed fund. The next was *Mackintosh* v. *Barber* (*n*), in which the point was not argued, but where again there was a mixed fund. The next case appears to be that of *Tylden* v. *Hyde* (*o*), where a testator, after giving several legacies, directed the residue of his property, both landed and personal, to be converted into money, and paid to several persons, and it was held, that the executors had an implied power to sell the real estate.

Ward v. *Devon.*

Mackintosh v. *Barber.*

Tylden v. *Hyde.*

Judgment of Sir John Leach.

The judgment of Sir J. Leach, V. C., was as follows (*p*):—"*When there is a general direction to sell,* but it is not stated by whom the sale is to be made, then, if the produce of the sale is to be applied by the executors in the execution of their office, a power to sell will be implied to the executors. Here the produce of the sale

(*m*) 11 Sim. 160, 9th February, 1805; *ante*, p. 54.

(*n*) I Bing. 50, 19th June, 1822.

(*o*) 2 Sim. & Stu. 238.

(*p*) *Ibid.* 241.

is to be confounded with the personal property which must necessarily be divided by the executors; and by the rule which I have stated, a power to sell is therefore implied to the executors." Nothing can be clearer than this decision; there was a mixed fund rateably applicable, and it falls within the principle of *Ward* v. *Devon* and *Forbes* v. *Peacock*, already mentioned (*q*).

These cases exhaust all the authorities. The unlearned, and perhaps even the learned reader, may, by this time, be satisfied that, prior to the case of *Shaw* v. *Borrer* (*r*), there was no authority to support any such proposition as that a mere *charge of debts* implies any power of sale to the executor. That case, however, and those of *Ball* v. *Harris* (*s*), and *Gosling* v. *Carter* (*t*), suggested such an argument; and the point soon afterwards directly arose in the case of *Doe* d. *Jones* v. *Hughes* (*u*). In that case a testator, after charging generally his real estate with the payment of his debts, gave and devised all his lands (*except his Bala houses*) to his wife for life, with remainder to Hugh Hughes in fee. The Bala houses, being excepted from the devise, descended to the testator's heir-at-law; and the Court of Exchequer after an able argument, in which all the principal authorities were cited, and after taking time to consider, delivered a unanimous judgment that the executrix of the will had no implied power, by reason of the charge of debts, to sell or mortgage the Bala houses; but that they descended to the heir subject only to an *equitable charge* of the testator's debts thereon. The Court remarked that the case was not within the principle of any of those in which it had been held that there was an implied power of sale or mortgage (*x*). "We have perfectly satisfied ourselves on that head."

Doe d. *Jones* v. *Hughes.*

Judgment of the Court of Exchequer.

The charge gives the executor no power to sell.

(*q*) *Ante*, p. 54.
(*r*) 1 Keen, 559.
(*s*) *Ante*, p. 71.
(*t*) *Ante*, p. 73.
(*u*) 6 Exch. Rep. 223.
(*x*) *Ibid.* 233.

It would be difficult to find two better lawyers than the learned Barons Parke and Alderson by whom this decision was pronounced. The difficulty indeed seems to be, to imagine upon what principle the notion of a charge conferring such a power ever came to be entertained. It might have been supposed that this decision would settle the law. This, however, was far from being the case, as will be seen by the remarks of the learned Judge, who had occasion to make the next decision on the subject.

Dicta in *Robinson* v. *Lowater*.

The next case was *Robinson* v. *Lowater* (*y*), and in this case the following remarks were made by his Honor the Master of the Rolls on the decision of *Doe* d. *Jones* v. *Hughes*: "I have next to consider, whether this case is varied by the circumstance that the devise is not a trust for the payment of debts, but merely a charge of such deficiency as the personal estate shall be insufficient to pay. The case of *Doe* d. *Jones* v. *Hughes* (*z*) is relied upon to show that the executor could not make a good title to sell, and had no authority to sell vested in him. I find it difficult to reconcile the decision in that case with the numerous authorities to be found on this subject in Chancery; amongst which I may refer to *Ball* v. *Harris* (*a*), where Lord Cottenham observes that a charge of debts is equivalent to a trust to sell so much as may be sufficient to pay them; *Forbes* v. *Peacock* (*b*), which on this point is not affected by the reversal of the decision (*c*), and to the case of *Gosling* v. *Carter* (*d*). Before the case in the Exchequer, I had considered the law to be that a charge of debts on an estate devised, gave the executors an

(*y*) 17 Beav. 592; 5 De Gex, M. & G. 272.

(*z*) 6 Exch. Rep. 223; *ante*, p. 81.

(*a*) 4 Myl. & Cr. 264; *ante*, p. 71.

(*b*) 12 Sim. 541; *ante*, p. 54.

(*c*) 1 Phillips, 717.

(*d*) 1 Collier, 644; *ante*, p. 73.

implied power of sale, because to use the expression of Sir J. Leach, in *Bentham* v. *Wiltshire* (*e*), the power to sell is 'implied from the produce being to pass through their hand in the execution of their office, as in the payment of debts or legacies.'"

Remarks on these dicta.

The reader of the preceding pages will remember in what respects a charge of debts is equivalent to a trust, and in what respects it is not (*f*). It is equivalent to a trust in that it gives the simple contract creditor the same right to be paid, but it is not equivalent to a trust either in the rank in which the lands become applicable, or in preventing the Statute of Limitations from running against the creditors. The statute runs because there is no trustee, no person entrusted with authority to sell. How then can the charge confer by implication a power to sell? The case of *Forbes* v. *Peacock* was, as we have seen, the case of a mixed fund, and depended upon totally different principles. In *Gosling* v. *Carter*, all persons interested concurred in the conveyance. And the dictum of Sir J. Leach, in *Bentham* v. *Wiltshire*, seems directly opposed to the position in support of which it is cited. He says, the power to sell is implied from the produce being to pass through the hands of the executors in the execution of their office, as in the payment of debts or legacies. This is true if the produce is by the will expressed or implied so to pass; but it merely begs the question, to say that a simple charge of debts creates such an implication. The charge charges the land only. The executor's duty is only with the personalty. The older lawyers never dreamt of any such doctrine. In *Walker* v. *Smallwood* (*g*), a testator devised his estate charged with payment of debts, and Lord Camden, in his judgment, said that the creditors had a right to call on *the heir or devisee* to execute the

Opinions of the older lawyers.

Lord Camden.

(*e*) 4 Madd. 49; *ante*, p. 53.
(*f*) *Ante*, pp. 40, 43, 56.
(*g*) Amb. 676.

trust. He says nothing about the executor, and it is obvious in what sense the word trust was here used, namely, that of a duty to pay the creditors out of the lands which devolved upon the heir or devisee. So, in *Hargreaves* v. *Michell* (*h*), Sir John Leach says, that a charge of debts is a trust to be executed by the *devisee or heir*. So Lord Cottenham, in *Eland* v. *Eland* (*i*), remarks, "What evidence is it of a breach of trust that a party having such an estate subject to such a charge sells the estate as his own? He is in truth the owner subject to a charge, and it is *his duty* to satisfy the debts which the sale may be the very means of enabling him to do." Again, in *Johnson* v. *Kennett* (*j*), there was a charge of debts, and a devisee was also executor; but neither Lord Lyndhurst, by whom the case was decided, nor Lord Cottenham, in his comments on that case (*k*), nor Lord St. Leonards, in his remarks on the same case, in *Stroughill* v. *Anstey* (*l*), thought it worth while to mention that circumstance. Again, in *Walker* v. *Aston* (*m*), there was a general charge of debts and legacies and a devise in strict settlement subject to that charge. The property was ordered by the court to be sold, but no person seems to have supposed that the executor could sell, and an order was accordingly made by the court for the tenant in life to convey under the 12th section of the stat. 11 Geo. IV. & 1 Will. IV. c. 47, to which we have before referred (*n*).

Sir John Leach.

Lord Cottenham.

Lord Lyndhurst.

Lord Cottenham.

Lord St. Leonards.

The case of *Robinson* v. *Lowater*.

The case of *Robinson* v. *Lowater* was a peculiar one. The decision of the court below was affirmed on appeal (*o*); but neither the decision itself, nor the language of the learned Judges who decided it, forms any au-

(*h*) 6 Madd. 326.
(*i*) 4 Myl. & Cr. 428.
(*j*) 6 Sim. 384; 3 Myl. & Keen, 624.
(*k*) 4 Myl. & Keen, 428.
(*l*) 1 De Gex, M. & G. 652.
(*m*) 14 Sim. 87.
(*n*) *Ante*, p. 32.
(*o*) 5 De Gex, M. & G. 272.

No authority for the proposition that a charge of debts always empowers executors to sell.

thority for the general proposition which has been sometimes deduced from it, that a charge of debts always implies a power for the executor to sell. The decision itself goes no further than *Gosling* v. *Carter* (*p*) had already gone, namely, that where there is a charge of debts, and subject thereto a devise for life, with remainders over, all persons interested may convey the land so charged and devised, to a purchaser, and the tenant for life may give a valid receipt for the purchase money. The case was this:—the testator had a property at Rutland Place, which was subject to a mortgage for 200*l.* He had also a small property at Sandfield, which was the subject of the suit, and the legal estate in which was outstanding in one Nathaniel Sully. By his will, dated in 1817, he specifically devised the Rutland Place property to his daughter for life, with remainder to her children, who were the plaintiffs in the suit. He devised the Sandfield propety to his son Richard Sully (whom he also appointed sole executor) for life, with remainder to his children living at his decease, with a limitation over in case he had none. He then charged another real estate, and also his personal estate with the payment of the mortgage debt of 200*l.* owing on the Rutland Place property, and his just debts; but if the premises thus charged, and the personal estate should not be sufficient for that purpose, *then he charged his Sandfield property, with the payment of the deficiency.* The testator died in 1819. In 1820, Richard Sully, in consideration of 175*l.*, sold and conveyed Sandfield to Nathaniel Sully, the person in whom the legal estate was already vested. The testator's heir-at-law, and *every one directly interested in the Sandfield estate,* concurred in the conveyance (*q*), but not the devisees of the Rutland Place property. The mortgage debt of 200*l.* on the Rutland Place property remained

(*p*) 1 Coll. 644; *ante*, p. 73. (*q*) 17 Beav. 593.

unpaid until 1852, when, the tenant for life of that property having died, her children filed the bill against the defendant, whose title to Sandfield was derived under the purchase made by Nathaniel Sully, and insisted that the Sandfield property was still liable to pay off the mortgage of 200*l.* on the Rutland Place property. Their bill was, however, dismissed, and the dismissal was, as we have said, affirmed on appeal. The Statute of Limitations would alone have been an answer (*r*), as was argued by the defendant's counsel (*s*). And, independently of this, all persons interested having concurred in the sale, there was no necessity to resort to the capacity of executor, in which the tenant for life stood.

Judgment of the Lord Justice Knight Bruce.

The judgment of the Lord Justice Knight Bruce was merely this: "According to the true construction of the will before us, I think that the Sandfield closes were well and effectually sold in the circumstances and manner in which they were sold, a statement in which I mean to include a declaration of opinion that the receipt given for the purchase money was an effectual receipt. I consider the conclusion of the Master of the Rolls the correct conclusion, and that the appeal motion ought to be refused with costs." The Lord Justice Turner delivered the following judgment: "The testator has, in effect, directed that the deficiency of his personal estate for the payment of his debts shall be raised out of the Sandfield estate; for it cannot be said that the direction which charges the estate with that deficiency does not amount to a direction that the deficiency shall be raised and paid out of the estate. The question then is, how and by whom the money was to be raised. The purpose for which it was to be raised being to pay the debts, it must have been in the contemplation of the testator that it would have to be raised immediately, but no power is given to the de-

Judgment of the Lord Justice Turner.

(*r*) *Ante*, p. 43. (*s*) 17 Beav. 596.

visees to raise it; and the will containing a devise of a life estate with contingent remainders over, it is impossible that, during the subsistence of those contingent remainders, the devisees could themselves raise it. On the face of this will, therefore, it was not the intention of the testator that the money should be raised by the devisees. Then who was to raise it? Surely the persons who would have to apply the fund. It seems to me, therefore, upon the whole scope of this will, without reference to the cases decided upon the subject, that in this case at least, it was the intention of the testator that the money should be raised by the executor; and if by the executor, then the executor must be considered as vested with all the powers necessary to raise it. I think there is abundant reason for the conclusion at which the Master of the Rolls has arrived in this case. The appeal must be dismissed with costs." This is a very cautious judgment, and by no means commits the eminent Judge who delivered it, to all the doctrine laid down in the court below. It suggests a distinction between the charge of the particular property in question under the particular circumstances of the case, and a general charge of debts. Now to hold the executor entrusted with the sale, is to hold that *a trust* is created, and, if so, then it is *not a mere charge*, but a trust. Is a line to be drawn between plain implication and actual expression? A trust we have seen differs from a charge. If, therefore, the devisee for life took a power to sell as executor, this is tantamount to a decision that, under the words of the will, there was *not a mere charge*, but a trust of which the executor was trustee.

The first case, in which it was expressly decided that a general charge of debts on the real estate gives the executors an implied power of sale, is *Wrigley* v. *Sykes* (*t*). *Wrigley* v. *Sykes.*

(*t*) 21 Beav. 337; 2 Jur. N. S. 78.

The first decision that a general charge of debts empowers executors to sell.

In that case, the estates in question appear to have been mortgaged in fee, and their owner, Jonathan Wrigley, commenced his will by a general direction that all his just debts, funeral expenses and charges of probate and legacies, should be paid out of his real and personal estate. He then devised all his freehold lands and hereditaments, whatsoever and wheresoever, to James Lees and Thomas Bradbury, their executors, administrators and assigns, for 500 years, upon the trusts thereinafter stated; and he devised and bequeathed all his real and personal estate, subject as to the freehold estates, to the term of 500 years, unto his five sons, John, James, Thomas, Jonathan and George, their heirs, executors, administrators and assigns, in equal shares as tenants in common, upon condition that they should pay, in equal shares, two legacies and two annuities given by the will, and all his mortgage and other debts. And as to the term of 500 years, the testator declared that the said James Lees and Thomas Bradbury should stand possessed of the premises comprised therein, upon trust if any of his said sons should, for the space of thirty days after demand, refuse or neglect to pay his or their proportion of the said two legacies and annuities and his mortgage and other debts, or any part thereof, then the trustees should, out of the rents and profits of the share of any such son, or by mortgage or sale of the whole or a competent part of the share of such son in the premises comprised in the term, raise such sums as such son ought to have paid, and all costs and expenses of raising the same. And the testator directed that the receipts of the said trustees or trustee for the time being should be sufficient discharges to the mortgagees or purchasers of any of the said hereditaments. The testator appointed his five sons executors, and died in 1822. All the sons proved his will, and two of them afterwards died. The personal estate being, as was alleged, insufficient for the payment of the debt for which the

premises were mortgaged and the other debts of the testator, the plaintiffs, who were the three surviving sons, considered that they, as surviving executors, had power to sell the property, and accordingly in December, 1853, contracted with the purchaser, the defendant, for the sale thereof to him; and upon his declining to complete, on the ground that they had no such power without the concurrence of the trustees of the term, the plaintiffs instituted the suit for the specific performance of the contract: his Honor, the Master of the Rolls, decreed specific performance accordingly. He was of opinion that the creation of the term, which had a distinct and specified object, did not supersede the general charge for the payment of debts, *which, in his opinion, gave the executors power to sell.*

Remarks on *Wrigley* v. *Sykes.*

This case goes far beyond *Robinson* v. *Lowater*, and it cannot by any means be inferred from that case, that the learned Judges who affirmed it, would also have affirmed *Wrigley* v. *Sykes*. The testator had himself provided an elaborate machinery for raising the money necessary for the payment of his debts. How could he possibly have intended that machinery to work, if he intended also to supersede its working by an absolute power of sale, to be given by implication to his executors? The devisees had enjoyed the estate for upwards of thirty years from the death of the testator. The executors, who sold, were themselves some of the devisees, who were bound by the directions of the will to pay each a proportion of the debts. For all that appeared, they might have been selling the shares of their deceased brothers behind the backs of their representatives, in order to raise their own proportion only, or entirely for their own purposes. The doctrine that a mere charge of debts gives an executor power to sell, is sometimes supported on the ground of con-

venience (*u*). Indeed this seems to be the only argument in its favour. It is possible, however, to have too much convenience. When one person, without the slightest inconvenience to himself, has a perfect right at any time to sell the estate of another, it may be thought that convenience has been carried too far.

Opinion of Lord St. Leonards on these cases.

Lord St. Leonards makes the following remark on both these cases (*x*): "*Robinson* v. *Lowater* and *Wrigley* v. *Sykes*, have introduced considerable difficulty upon titles, by implying a power of sale in executors from a charge of debts, although the estate is devised to others. This is contrary to the received opinion. It would not be safe to rely on the authority of these cases." See how Lowes v Cartwright 8 Ch. 971.

Eidsforth v. *Armstead.*

The next case was *Eidsforth* v. *Armstead* (*y*), which was similar to *Robinson* v. *Lowater*, except that the charge relied on was of a single legacy only. This case was decided on the authority of the former case, by which the very eminent Judge who decided it appears to have considered himself bound. There was a general charge of debts, but this was not relied on; a power to sell to raise the legacy was considered to be vested in the trustees of the will, who were merely tenants *pur autre vie* of the legal estate, but were also executors.

Stat. 22 & 23 Vict. c. 35, ss. 14—18.

These decisions, and the comments which were made upon them, gave occasion to the enactments, to which we have before referred (*z*), conferring in some cases on the trustees, and in other cases on the executors of a will, coming into operation since the 13th August, 1859 (the date of the act), a power to sell or mortgage

(*u*) Clayton's Elements of Conveyancing, p. 110.

(*x*) Sugd. V. & P. 545, n., 13th ed.

(*y*) 2 Kay & J. 333.

(*z*) Stat. 22 & 23 Vict. c. 35, ss. 14—18; *ante*, pp. 74, 75.

Direction that Exors shall pay debts followed by a gift to them of all his real est. either beneficially or in trust make the debts payable out of the est. so given. See Bailey v B. 12 Ch D 268. Re Thompson Williams London 20 Ch D 463.

real estate for the payment of the debts or legacies charged thereon by the will. It will be observed that they extend to wills coming into operation after the passing of the act, although they may have been made before, giving to such wills an *ex post facto* interpretation never contemplated by the testator. In such a case as that of *Wrigley* v. *Sykes*, or in any other case where a testator may carefully have provided for the payment of his debts by the not unusual method of creating a term of years in trustees for that purpose, the existence of a general charge will enable the executors, whom the testator may have appointed solely to take care of his personal estate, to sell or mortgage any of his lands. At the same time the power of a devisee of lands simply charged with debts to sell or mortgage, is recognized by the 18th section (*a*). Another anomaly seems therefore to have been now added to the law. A charge of debts is still merely a charge, except in cases which fall within the 14th and 16th sections of the act. But in these cases the testator, or the legislature on his behalf, has created a fiduciary power. A charge in words has now become a trust in effect. The creditors have persons appointed to look after them; and the trustees and executors, when they agree to act under the will, undertake an express trust, and such a trust as, it is presumed, would enable them (even should legacies only be charged) to give an effectual receipt under the 29th section of the subsequent statute 23 & 24 Vict. c. 145 (*b*). This is mentioned to show that a trust is created. Property thus circumstanced would therefore, it is presumed, stand on the same footing of priority, as other real estate expressly appropriated by the testator for payment of his debts, and would be applied before lands descended to the heir, and also before property charged with

(*a*) *Ante*, p. 75. (*b*) *Ante*, p. 50.

debts, but simply devised beneficially in fee or in tail, subject to the charge. Again, it is presumed, that the devisee in fee or in tail of lands simply charged with debts, might set up the Statute of Limitations (*b*) against the creditors; but, where the trustees or executors have power to sell, there the creditors would lose nothing by not bestirring themselves, since they have trustees charged with the duty of seeing them paid (*c*).

Bolton v. *Stannard.*

These enactments not referring to wills which came into operation before their passing, left the subject open with regard to such wills. Accordingly, in *Bolton* v. *Stannard* (*d*), the Master of the Rolls expressed, in accordance with his previous decisions, an opinion that an executrix, who was tenant for life, could sell under a charge of debts. But, as is remarked by an able writer (*e*), the executorial authority culminated in the recent case of *Sabin* v. *Heape* (*f*), where it was held by the same learned Judge, that, under the implied power of sale raised by a general charge of debts, the executors of an executor could sell over the heads of devisees who had been twenty-eight years in possession, that the purchaser was not bound to see to the application of the purchase-money, and was not entitled to know whether any of the testator's debts remained unpaid!

Sabin v. *Heape.*

Hodkinson v. *Quinn.*

Trustees can sell without the

The tide now begins to turn. In the recent case of *Hodkinson* v. *Quinn* (*g*), the testator, after a general charge of debts, devised all his real estate in a certain place to trustees upon trust to sell after the death of his

(*b*) Stat. 3 & 4 Will. IV. c. 27, s. 40; *ante*, p. 43.

(*c*) *Ante*, p. 40.

(*d*) M. R., 6 W. R. 570.

(*e*) Mr. Badger, in Hayes and Jarman's Concise Forms of Wills, 432, n., 5th ed., where the whole question is well and succinctly discussed.

(*f*) 5 Jur. N. S. 1146.

(*g*) 1 Johns. & Hemm. 303; 7 Jur. N. S. 65.

two daughters, with power to give receipts, and appointed two other persons executors. It was held, that the trustees could, after the decease of the daughters, sell and convey, without the concurrence of the executors, who, it was argued, took a power of sale under the recent decisions, by reason of the charge of debts. This decision strongly supports our argument. The Court, however, considered that the recent decisions gave the executors also a power to sell, at least in equity if not at law; and no doubt this is so if those decisions be law, which it is submitted they are not. If the executors have any right to sell, it must be from an implied intention of the testator. Did the testator really intend that both his executors and his trustees should have power to sell, and that that sale should be binding which was first made? If anything is making a will for a testator, surely this is. It moreover creates on the score of convenience one of the most inconvenient dilemmas in which property can be placed. What can be worse than a divided power, or rather power to belong to the first who seizes it?

executors, notwithstanding a charge of debts.

The last case on this subject shows very clearly the fallacy of the whole doctrine. In *Cook* v. *Dawson* (*h*), the testator directed his debts to be paid *by his executrix thereinafter named*, and then devised his real estate, in a manner that was considered to give it to his wife Hannah Dawson for life, with remainders over, and appointed her sole executrix of his will. The court, in a suit to which the remaindermen were not parties, ordered the real estate to be sold for the payment of the testator's debts, his personalty proving insufficient for that purpose. The conditions were settled by one of the conveyancing counsel to the court. The purchaser however objected to the title, on the

Cook v. *Dawson.*

(*h*) M. R., 7 Jur. N. S. 130; 9 W. Rep. 305.

ground that, as the debts were ordered to be paid by the executrix, and the real estates were not devised to her in fee (*i*), there was in fact no charge of debts, and consequently the executrix had no power to sell. And the very court, which ordered the sale, decided that this objection was valid; that there was no charge of debts, and consequently no power for the executrix to sell. This case was affirmed, on appeal, by the Lords Justices. During the course of the argument, however, on the case of *Robinson* v. *Lowater* being cited by the counsel for the appellant, the Lord Justice Knight Bruce remarked, that that case had been very much questioned, and inquired whether it had not been questioned by Lord St. Leonards. His Lordship also, as we have before remarked, expressed a doubt as to the general doctrine (*k*). The case, however, does not appear to be touched by *Robinson* v. *Lowater*. If the lands were liable at all, it must have been by way of trust, under an implied devise to the executrix in fee, and not as a mere charge; and the executrix being a trustee, might then have sold as such. It was decided, however, that the lands were not clearly liable, the direction that the debts should be paid by the executrix not clearly amounting to a charge. But how stands the law, if a mere charge empowers the executor to sell? It stands thus. A testator, by merely directing his debts to be paid, implies that his debts are to be paid *by his executor*, and therefore his executor has, by implication, power to sell; but if, instead of merely *implying* that the debts are to be paid by the executor, the testator *says so* in so many words, then the executor has no power to sell! Reader, shut up thy understanding, and bow down before the idol of authority.

The Lord Justice Knight Bruce remarks that *Robinson* v. *Lowater* had been questioned.

The law according to the present authorities.

(*i*) See *ante*, pp. 46, 60.

(*k*) *Ante*, p. 73.

CHAPTER VII.

OF PRIORITIES, AND THEIR VARIATION.

We have now to consider more particularly the order in which the assets of a deceased person are applied in payment of his debts, in the absence of any express direction to the contrary: and also the circumstances under which the usual order of priority may be varied. The question of variation is one of intention, and as men's intentions are not only most various, but also most variously expressed, it is evidently impossible to lay down rules which shall apply to every case. Nor is it here intended to enter further than necessary into the wide province which belongs to the construction of wills. On this subject the well-known and able treatise of the late Mr. Jarman stands unrivalled; and his editors have, in the second edition, displayed an industry and independence of thought, which bode well for their success; though perhaps in some few cases, where the editors' opinions have been substituted for those of the author, the reader might have wished to have been furnished also with the latter.

Jarman on Wills.

All the debts of the deceased (except such as are secured by legal or equitable mortgage on the real estate of a person dying intestate after the 31st of December, 1854, or having devised the mortgaged estate after that date (*a*)), are, in the first place, payable out of the general personal estate. If, however, the case of *Lady Langdale* v. *Briggs* (*b*) be law, there may appa-

The general personal estate.

(*a*) Stat. 17 & 18 Vict. c. 113, *ante*, pp. 27, 36.

(*b*) 2 Jur. N. S. 982, 995, *ante*, p. 11.

rently be an indefinite, and as yet unascertained series of priorities amongst the personal estate, beginning with cash at the bankers, and ending perhaps with leaseholds for years. The costs of administering the testator's estate, and of interpreting his will, even respecting devises of real estate, also fall primarily on the general personal estate. Difficulties created by the testator himself, and without a solution of which his estate cannot be administered, ordinarily fall upon the same fund as his debts (*c*). Where, however, a difficulty of construction occurs only with respect to some particular legacy of money or stock, it seems to be in the power of the executors, if no suit for the administration of the estate has been commenced, to throw the costs of determining the construction solely on that legacy, by paying it into court under the Trustee Relief Acts (*d*). Under these acts the receipt of one of the cashiers of the bank for the money paid in, or the certificate of the proper officer of the transfer or deposit of the stocks or securities, is made an effectual discharge for the money, stocks or securities so paid, transferred or deposited. In the case of *Re Bartholomew's* will (*e*), the late Vice-Chancellor Shadwell decided that when such a payment of a legacy was made into court, the court had no jurisdiction to order payment of any of the costs in the matter out of the testator's general residuary estate. And he remarked that he had had a conversation with the Lord Chancellor on the subject of the injustice of allowing the executor, by paying the money into court, to put the parties entitled into a worse position than they would be if a bill were filed; and the impression on his mind

Costs of administration.

Trustee Relief Acts.

(*c*) *Howse* v. *Chapman*, 4 Ves. 542; *Nisbett* v. *Murray*, 5 Ves. 149; *Browne* v. *Groombridge*, 4 Madd. 495; *Ripley* v. *Moysey*, 1 Keen, 578; *Pickford* v. *Brown*, 2 Kay & J. 426, 436. The case of *Sanders* v. *Miller*, 25 Beav. 154, seems questionable on this point.

(*d*) Stat. 10 & 11 Vict. c. 96; 12 & 13 Vict. c. 74.

(*e*) V. C. E., 13 Jur. 380.

from that conversation was, that it was the intention of the statute to do this very piece of injustice. And in accordance with this decision the Vice-Chancellor Wood, in a recent case, declined to order a suit to be instituted, after a legacy had been paid into court by the executors; remarking, that the principle on which costs occasioned by the testator's mistake are paid out of the residue was, that the estate could not be administered without determining the question; but now that the executor can pay the fund into court, he is able to administer the estate on such payment (*f*).

Liability of separate property of a married woman.

If the deceased be a married woman entitled to property for her separate use, much difference of opinion prevails as to the extent and nature of the liability of such property to her debts. Of course, so far as she may have contracted debts, either expressly or by implication, as the agent of her husband, these debts are not her debts but his. But if her husband be not liable, as in cases of separation where the wife has a proper allowance, the question is, how far her debts ought to be paid out of her separate estate. It is clear that the wife, as a married woman, is not, according to our law, personally liable to the payment of any debts which she may contract; the remedy, if any, can only be against her property by suit in equity; for a married woman's separate estate is entirely a creature of equity. Equity, however, has always favoured the payment of debts; and, upon general principles, there seems to be every reason for allowing *bonâ fide* creditors of a married woman to be paid out of her separate estate. Nor can it, apparently, make any difference in principle whether the debt be secured by writing or not. "If," said Lord Brougham, in *Murray* v. *Barlee* (*g*), "in respect

(*f*) *In re Trusts of the Will of Bridget Feltham*, 1 Kay & J. 528, 534. See also *Re Ham's Trust*, 2 Sim. N. Rep. 106, 113.

(*g*) 3 Myl. & Keen, 209, 224.

of her separate estate, the wife is in equity taken as a *feme sole*, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or more properly her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the Statute of Frauds, and to require writing where that act requires none? Is there any equity reaching written dealings with the property, which extends not also to dealing in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable ground." It is stated, however, in the 7th edition of Lord St. Leonard's Treatise on Powers (*h*), to be the prevailing opinion, that a married woman's separate property is not liable to answer general demands upon her. And in a very recent case (*i*), the Lord Justice Knight Bruce founded his judgment on an opinion expressed by him to the same effect. The Lord Justice Turner, however, in the same case, remarked, that it was difficult to see upon what ground debts such as tradesmen's bills can be distinguished from the bonds, bills or notes, of married women, which have been in many cases held payable out of their separate estate; and his Lordship's judgment turned entirely on another point. On the point in question he was of opinion (*k*), that, in order to bind the separate estate by a general engagement, it should appear that the engagement was made with reference to, and upon the faith or credit of, that estate, and that, whether it was so made or not, is a question to be judged of by the court upon all the circumstances of the case. His Lordship was further of opinion, that

(*h*) Vol. 1, p. 206.

(*i*) *Johnson* v. *Gallagher*, L. J., 7 Jur. N. S. 273.

(*k*) 2 Jur. N. S. 278.

where a tradesman, who supplies goods to a married woman living separate from her husband, believes that she has separate estate, and deals with her on that assumption, the court is bound to impute to her the intention to deal with her separate estate, unless the contrary be clearly proved (*l*). It is to be hoped that this view of the case, which seems equally consonant with justice and reason, will ultimately prevail.

Appropriation of a specific part.

If the testator has appropriated any specific part of his personal estate for the payment of his debts, and has also disposed of his general residuary personal estate, the part so appropriated will be primarily liable to the payment of the debts (*m*). If, however, he has made no disposition of his general residuary personal estate, then, notwithstanding such an appropriation, the general residuary personal estate thus remaining undisposed of, will still remain subject to its primary liability to pay the debts (*n*). With regard to the costs of the administration of the estate where a specific part is appropriated as above mentioned, and the residue is bequeathed, there appears to be some conflict of opinion. It would seem, however, that the same principle of intention which, in ordinary cases, throws the costs upon the general personal estate along with the debts, would, in these cases, throw them on the fund appropriated to the payment of the debts (*o*). It may be admitted that such costs are not strictly testamentary expenses (*p*); but this remark scarcely seems to meet the whole matter in question, in cases where the debts and testamentary expenses are thrown by the testator on some specific

Costs of administration.

(*l*) 7 Jur. N. S. 280.

(*m*) *Browne* v. *Groombridge*, 4 Madd. 495; *Choat* v. *Yeates*, 1 Jac. & Walk. 102. See also *Bateman* v. *Hodgkin*, 10 Beav. 426.

(*n*) *Howes* v. *Chapman*, 4 Ves. 542; *Hewett* v. *Snare*, 1 De Gex & Sm. 333; *Lomax* v. *Lomax*, 12 Beav. 285; *Newbeggin* v. *Bell*, 23 Beav. 386.

(*o*) *Morrell* v. *Fisher*, 4 De Gex & Sm. 422.

(*p*) See *Browne* v. *Groombridge*, 4 Madd. 495, 502.

portion of his personalty. The question is, whether these costs are not so far in the nature of a debt as to be payable out of that fund, which the testator has set apart for the payment of his debts.

Exoneration of personal estate.

It requires very strong language on the part of the testator to exonerate his general personal estate from its primary liability to the payment of his debts. Of course nothing that he can say can deprive his creditors of their legal rights to resort primarily to his personal estate; but, as between the several persons to whom his property may be bequeathed or devised, he may, if he pleases, vary the priorities; but to do this, he must show an intention not only to charge his real estate with the payment of his debts, but also to exonerate his personal estate therefrom. Thus neither a general charge of the debts upon the real estate (*q*), nor an express trust created by the testator for the payment of his debts out of his real estate, or any part thereof (*r*), will be sufficient to exonerate the personal estate from its primary liability to pay them. Nor will it alter the case that the charge or trust for payment out of the real estate comprises also the testator's funeral and testamentary expenses (*s*); though this circumstance is not without its weight, if there be in the will other indications of an intention to exonerate the personalty (*t*). If, therefore, the personal estate be simply given to some legatee, and more particularly if the articles given be specifically mentioned, the indication thus afforded of the testator's wish that the personalty shall come clear to the legatee will, if coupled with an express trust for payment of the funeral and testamentary ex-

Funeral and testamentary expenses.

(*q*) *Ante*, p. 56; *Walker* v. *Hardwicke*, 1 Myl. & Keen, 396; *Ouseley* v. *Anstruther*, 10 Beav. 453.

(*r*) *Ante*, p. 40; *Bridgman* v. *Dove*, 3 Atk. 201; *Collis* v. *Robins*, 1 De Gex & Sm. 131.

(*s*) *Hartley* v. *Hurl*, 5 Ves. 540; *M'Cleland* v. *Shaw*, 2 Sch. & Lef. 538.

(*t*) *Bootle* v. *Blundell*, 1 Meriv. 193.

penses out of the real estate, be sufficient to exonerate the personalty (*u*). But if the personalty be simply given to the executor (*x*), or if the gift be merely of *the residue* of the personal estate (*y*), the personal estate will not be exempt. In fact an intention must appear to give the personal estate *as a specific legacy* to the legatee; and if this be the case, it will be exempt, and will be removed to that distant rank in point of application, in which all specific devises and bequests are held to stand (*z*). Powell v. Riley 12 Eq. 175

Lapse of bequest of the personalty.

In cases of this nature, the exoneration of the personal estate from the payment of the debts is considered to be intended by the testator only for the benefit of the legatee of the personalty. If, therefore, the bequest of the personal estate should lapse or be void, the exoneration will not take effect in favour of the next of kin, or the crown, on whom the personal estate may devolve by reason of the intestacy (*a*). If, however, there be an intention to exonerate the real estate, and yet no bequest of the personalty, the intended exoneration must enure for the benefit of the persons, whoever they may be, upon whom the personal estate may devolve (*b*).

Costs of administration.

In a recent case, where the testator expressly ex-

(*u*) *Greene* v. *Greene*, 4 Madd. 148.

(*x*) *Brummel* v. *Protheroe*, 3 Ves. 111; *Aldridge* v. *Lord Wallscourt*, 1 Ball & Beat. 312.

(*y*) *Watson* v. *Brickwood*, 9 Ves. 447; *Tower* v. *Lord Rous*, 18 Ves. 132, 139.

(*z*) *Tower* v. *Lord Rous*, 18 Ves. 139; *Michell* v. *Michell*, 5 Madd. 69; *Driver* v. *Ferand*, 1 Russ. & Myl. 681; *Blount* v. *Hipkins*, 7 Sim. 43; *Young* v. *Young*, 26 Beav. 522; *Lance* v. *Aglionby*, 27 Beav. 65.

(*a*) *Hale* v. *Cox*, 3 Bro. C. C. 322; *Waring* v. *Ward*, 5 Ves. 670, 676; *Dacre* v. *Patrickson*, 1 Drew. & Sm. 187.

(*b*) *Dacre* v. *Patrickson*, 1 Drew. & Sm. 189, where the learned Vice-Chancellor points out an error in Jarman on Wills, Vol. 2, p. 592, 1st ed., 566, 2nd ed., in the account of the case of *Milnes* v. *Slater*, 8 Ves. 308, in which case the personalty was not, in fact, bequeathed as there stated.

empted his personal estate from the payment of his debts, and bequeathed the same on trusts for his wife and children, it was held that the costs of administering the whole estate, both real and personal, were nevertheless primarily payable out of the personal estate (*c*). This case does not seem reconcileable with the decision of the Vice-Chancellor Knight Bruce in *Morrell* v. *Fisher* (*d*), where the costs of administration were held payable out of a specific portion of the personal estate appropriated by the testator for the payment of his debts. If the testator intends the legatee of the personalty to take the whole as a specific bequest, can it be supposed that he intends him to take it subject to so heavy a charge as that of the whole costs of administering his estate?

Charge of particular debt.

A charge of some particular debt, or a trust to raise it, differs from a charge or trust for payment of the debts generally. The former charge seems to indicate a disturbance of the priorities as to that particular debt only; and accordingly the debt so charged or directed to be raised, will be considered as primarily payable out of the estate charged therewith (*e*). We have already seen that, before the statute 17 & 18 Vict. c. 113 (*f*), a mortgage debt was, like any other debt, primarily payable out of the general personal estate.

Exoneration of mortgaged lands.

The heir or devisee of the mortgaged land had therefore a right to call upon the executor to pay off the mortgage out of the general personalty, unless the testator had expressly charged the land devised, or the devisee, with the payment of the mortgage thereon. Much litigation arose upon the question whether the devisee of

(*c*) *Stringer* v. *Harper*, 26 Beav. 585; 5 Jur. N. S. 401.

(*d*) 4 De Gex & Sm. 422.

(*e*) *Hancox* v. *Abbey*, 11 Ves. 179; *Evans* v. *Cockeram*, 1 Coll. 428; *Coote* v. *Coote*, 3 Jo. & Lat. 178; *Lockhart* v. *Hardy*, 9 Beav. 379.

(*f*) *Ante*, p. 36.

the mortgaged land was or was not, under the terms of the will, primarily bound to pay the mortgage. It was held that a devise of the mortgaged land, *subject to the mortgage*, was not of itself a sufficient indication of an intention to charge the land with the debt (*g*); but a devise to a person, "he paying the mortgage" thereon, was evidently a trust imposed on him to pay this particular debt, and consequently rendered the devisee primarily liable to its payment (*h*). Again, if the debt were not the debt of the testator, but were simply a charge on the land, in respect of which the testator was under no personal liability to the mortgagee, the personal estate of the testator would not be liable to its payment, and the devisee must then have borne the burden himself (*i*). Nor would the circumstance of a testator having rendered himself personally liable to the payment of a mortgage debt, not of his own creation, but charged on the lands prior to his acquisition of them, render his personal estate primarily liable as between the executor and the devisee (*k*), unless an intention on his part were manifest to adopt the debt as his own (*l*). Thus a purchase of an estate already mortgaged, would not be considered as an adoption of the debt by the purchaser, although the mortgage debt formed part of the price, and the purchaser covenanted with the vendor to pay the debt, and indemnify him against it (*m*). So, if a person were tenant for life under a settlement, which contained a power for him to charge

Devise subject to the mortgage.

Where the mortgage was not the debt of the testator.

Purchase of an estate in mortgage.

Charge by tenant for life.

(*g*) *Serle* v. *St. Eloy*, 2 P. Wms. 386; *Goodwin* v. *Lee*, 1 Kay & J. 377; *Townshend* v. *Mostyn*, 26 Beav. 72.

(*h*) *Lockhart* v. *Hardy*, 9 Beav. 379.

(*i*) *Scott* v. *Beecher*, 5 Madd. 96; *Swainson* v. *Swainson*, 6 De Dex, M. & G. 648; *Bond* v. *England*, 2 Kay & J. 44.

(*k*) *Earl of Ilchester* v. *Earl of Carnarvon*, 1 Beav. 209.

(*l*) *Bruce* v. *Morice*, 2 De Gex & Sm. 389.

(*m*) *Woods* v. *Huntingford*, 3 Ves. 128, 131; *Tweddell* v. *Tweddell*, 2 Bro. C. C. 101, 151. The case of *Earl of Belvidere* v. *Rochfort*, 5 Brown's Parl. Ca. 299, Tomlin's ed., must now be considered as overruled. See 2 Kay & J. 59.

the settled lands with the payment of a sum of money, here, if he exercised the power, the lands settled would still be primarily liable to pay the money charged, even though the person exercising the charge received the money, and thus benefited his personal estate, and also covenanted with the mortgagee for repayment. The debt, being created under a power in the settlement, stood on the same footing as if created by the settlement itself; and it was the evident intention of the settlor to create a charge on the land, and not merely to allow it to be pledged (*n*). Again, if a person charged money on his lands, not merely by way of security, but as a portion for a daughter, or as a jointure for his wife, intending not a mere pledge, but to onerate the lands so charged, the lands charged would be primarily liable to repay the amount charged, notwithstanding that the person so charging might have entered into an express covenant to pay the money charged (*o*).

Charge for portion or jointure.

Mortgaged lands now primarily liable.

Legal and equitable mortgage debts charged on the real estate of a testator, who shall have died intestate after the 31st December, 1854, or devised the mortgaged property after that date, are by a recent act, in the absence of any contrary intention, made primarily payable out of the estate charged therewith (*p*). And according to the decision of Lord Campbell in *Woolstonecroft* v. *Woolstonecroft* (*q*), it will require as strong language to exonerate the lands from their primary liability, as is required in other cases to exonerate the general personal estate. It is presumed that this act does not apply to leaseholds, as, though they are estates in land, they do not pass to the heir or devisee. It is clearly inapplicable to chattels personal.

Leaseholds.

(*n*) *Ibbetson* v. *Ibbetson*, 12 Sim. 206; *Jenkinson* v. *Harcourt*, Kay, 688.

(*o*) *Graves* v. *Hicks*, 6 Sim. 398; *Loosemore* v. *Knapman*, Kay, 123.

(*p*) Stat. 17 & 18 Vict. c. 113; *ante*, pp. 27, 36.

(*q*) 9 Weekly Rep. 42; 6 Jur. N. S. 1170; *ante*, p. 37.

If the testator has created a mixed fund by ordering the whole of his real and personal estate to be sold and converted into money, and applied in payment of his debts, the personal and real estate will, as we have seen (*r*), be applied rateably; and the costs of a suit for the administration of the testator's estate will also be similarly apportioned (*s*). **A mixed fund.** **Costs of administration.**

Real estate devised either absolutely, or for a term of years, upon a trust for payment of debts, or subject to a fiduciary power of sale or mortgage for their payment, is applicable to the payment of the debts, next after the general personal estate (*t*). It would seem also that since the stat. 22 & 23 Vict. c. 35 (*u*), lands over which either the trustees (*x*), or the executors (*y*), have a power of sale or mortgage by virtue of that act, in respect of a charge of debts, come within this division. **Lands devised upon trust.** **Stat. 22 & 23 Vict. c. 35, ss. 14, 16.**

Next to lands subject to a trust, or power, come lands which have descended to the heir (*z*). If, however, the heir takes, by reason of a lapsed devise or otherwise, land simply charged with debts, the lands so charged will not be applied until after the other lands descended (*a*). In fact the heir will take them subject to the same liabilities as the devisee would have taken had he survived the testator (*b*). Ayres v. Ayres. 11 Eq. 539
x Stead v. Hardaker. 15 Eq. 175. **Lands descended.**

Next after lands descended, come lands simply charged with the payment of the debts (*c*). **Lands simply charged.**

(*r*) *Ante*, p. 52.

(*s*) *Eyre* v. *Marsden*, 4 Myl. & Cr. 231; *Shuttleworth* v. *Howarth*, Cr. & Phil. 228; *Christian* v. *Foster*, 2 Phil. 161.

(*t*) *Milnes* v. *Slater*, 8 Ves. 295; *Manning* v. *Spooner*, 3 Ves. 114.

(*u*) *Ante*, pp. 74, 75, 90, 91.

(*x*) Sect. 14.

(*y*) Sect. 16.

(*z*) *Ante*, pp. 43, 44.

(*a*) *Wood* v. *Ordish*, 3 Sm. & Giff. 125.

(*b*) *Fisher* v. *Fisher*, 2 Keen, 129.

(*c*) *Donne* v. *Lewis*, 2 Bro. C. C. 257, 263; *Irvin* v. *Ironmonger*, 2 Russ. & Myl. 531.

Real est. undisposed of thro' lapse liable for costs of administn in priority to personalty specifically bequeathed. Stott v Cumberland 18 Eq. 578.
Lapsed sh. of residue personal and [illegible] residue [illegible] bequeathed. Per V.C.M. Gowan v Broughton 19 Eq. 77.

Lands mortgaged.

Vendor's lien.

Lands devised subject to a mortgage, not within the statute 17 & 18 Vict. c. 113, are next liable so far as regards the mortgage debt (*d*); but the lien of a vendor for unpaid purchase money is not considered as a mortgage debt within this principle (*e*). When a person devises lands which he has mortgaged, he gives only the equity of redemption (*f*), but when he devises lands which he has bought, but not paid for, he devises the lands themselves; and although the devisee of a mortgaged estate has a right to have it exonerated at the expense of property primarily liable, the intention in his favour does not seem so strong as that in favour of the devisee of lands on which a mere lien exists for unpaid purchase money.

Whether vendor's lien within stat. 17 & 18 Vict. c. 113.

A question may arise whether the lien of a vendor for unpaid purchase money is within the statute 17 & 18 Vict. c. 113 (*g*). We have seen that an equitable charge has been decided to fall within that statute (*h*). But looking at the different light in which the vendor's lien has always been regarded, as compared to a mortgage or any other charge, it will probably be held that the vendor's lien for unpaid purchase money is not within the statute.

Pecuniary legacies.

Pecuniary legacies are next applicable to the payment of the testator's debts, and the costs of administering his estate (*i*). There seems to be a less distinct intention to benefit such a legatee, than to give to a specific legatee or devisee, the property bequeathed or devised to him by the testator.

Residuary devise.

It seems to be perhaps the better opinion, that lands comprised in a residuary devise are applicable before

(*d*) *Lutkins* v. *Leigh*, Cas. temp. Talbot, 53.

(*e*) *Wythe* v. *Henniker*, 2 Myl. & K. 635.

(*f*) *Forrester* v. *Lord Leigh*, 1 Ambl. 171, 174.

(*g*) *Ante*, p. 36.

(*h*) *Pembrooke* v. *Friend*, 1 Johns. & Hemm. 132; *ante*, p. 37.

(*i*) *Barton* v. *Cooke*, 5 Ves. 461.

property specifically devised or bequeathed (*k*), but this is still unsettled.

Real or personal estate specifically devised or bequeathed appears to be next applicable rateably (*l*); and the costs of the administration of the testator's estate are, in the absence of other funds, apportioned in the same manner (*m*).

Specific devises and bequests.

Real or personal estate appointed under a general power of appointment vested in the testator, appears to be lastly applicable (*n*). But if the person exercising the power be a married woman, the property appointed will not be subject to her debts (*o*), except in cases of fraud (*p*). The reason of this rule appears to be that in ordinary cases property appointed under a general power is not applied in payment of the debts until all the testator's own property shall have been exhausted; but the property of a married woman, not settled to her separate use, is not by our law liable to any engagements contracted by her whilst under coverture. As, therefore, this property cannot be first applied, it would be a hardship on the appointee to impose on him a more stringent liability than he would be subject to were the appointor not under the disability of coverture. But fraud is an exception to every rule, and those who have suffered by it have a right to every possible redress from the fraudulent person, and from all others who may derive their claims under him or her.

Property appointed under a general power.

Appointment by a married woman.

(*k*) *Ante*, pp. 35, 36.

(*l*) *Long* v. *Short*, 1 P. Wms. 403; *Tombs* v. *Roch*, 2 Coll. 490; *Gervis* v. *Gervis*, 14 Sim. 654; *Fielding* v. *Preston*, 1 De Gex & J. 438.

(*m*) *Bristow* v. *Bristow*, 5 Beav. 289.

(*n*) *Fleming* v. *Buchanan*, 3 De Gex, M. & G. 976; *ante*, pp. 12, 38. See 2 Jarm. on Wills, 526, *et seq.*, 2nd ed.

(*o*) *Vaughan* v. *Vanderstegen*, 2 Drew. 165.

(*p*) *Ibid.* 363, 403.

CHAPTER VIII.

Of Marshalling Assets.

The testator's intention regarded in the order of application.

The order in which we have seen that the various portions of a testator's estate are applied for the payment of his debts, has been established out of regard to the testator's intention. The general personal estate was long the only fund to which all those creditors who had not specialties binding the heir could resort; and besides, cash, stock and moveables, come first to hand, and are the most readily applicable, and are the funds out of which people in their lifetime usually pay their debts. It cannot therefore be matter of surprise that, in the absence of any express direction to the contrary, the general personal estate should be held primarily applicable to the payment of the debts of the deceased. Next after that, any special fund set apart by the testator would naturally come. The heir not being a beneficiary within the testator's intention, lands descended to him would properly follow next in the order of application. But lands charged with the payment of debts would of course be applicable before legacies bequeathed, or property specifically given. Again, there seems a more direct intention to benefit a specific devisee or legatee, than to benefit the legatee of a mere pecuniary legacy. Pecuniary legacies must, therefore, go unpaid, rather than that specific devises or bequests shall be touched. These, however, must be resorted to as a last resource; whilst lands over which the testator may have exercised a general power of appointment are, in favour of creditors, considered as

supplementarily applicable, after the whole of his own property shall have been exhausted.

Priority amongst creditors.

But besides this orderly application of the testator's property, we have seen that there exist also priorities amongst the creditors themselves. In the distribution of the personal estate, there are several orders of priority (*a*), and when there is no trust or charge for payment of the debts out of the real estate, creditors who hold specialties binding the heir are preferred, so far as the real estate is concerned, to other creditors who are not so fortunate (*b*).

Marshalling assets.

Now it may happen that a creditor, having a claim on two or more funds, proceeds against them in a different order from that which the testator intended, or proceeds against some fund which is the only resource of some other creditor less amply armed than himself. In order, therefore, to preserve the intention of the testator as far as possible, and also, as far as possible, to provide for the just claims of all creditors, equity, in a case of this sort, will marshal the assets; that is to say, it will allow in the one case the disappointed legatee or devisee, in the other the disappointed creditor, to stand in the shoes of the creditor who has caused the disarrangement, so that everybody may as far as possible enjoy his due.

Marshalling in favour of legatees and devisees.

There are therefore evidently two kinds of marshalling; marshalling in favour of legatees and devisees, and marshalling in favour of creditors. And, first, of marshalling in favour of legatees and devisees. In order to ascertain whether equity will in any case marshal assets in favour of legatees or devisees, we have only to look to the order of application set forth

(*a*) *Ante*, p. 9. (*b*) *Ante*, p. 24.

in the last chapter. If this order has been disturbed by any creditor, equity will marshal the assets so as to set right the disturbance. Thus we have seen that the general personal estate is ordinarily first applied in payment of the debts, and that next in order comes real estate, subject to any trust or fiduciary power for raising and paying the debts. If, now, land subject to such a trust or power should be applied in payment of debts, for which it may turn out that the general personal estate is sufficient, the persons entitled to such land, or to the produce thereof, subject to the trust, would be entitled to be recouped out of the general personal estate the money thus erroneously applied (*c*).

Lands subject to a trust or power.

The heir-at-law.

Again, lands which descend to the heir are liable to the payment of debts after, first, the general personal estate, and, secondly, lands subject to a trust or power for their payment. If, therefore, the heir-at-law should have paid any debts whilst either of the above funds remains, he will have a right to have the assets marshalled in his favour, or to be repaid, first, out of the general personal estate (*d*), and, secondly, out of the lands subject to the trust or power (*e*); but not to the prejudice of pecuniary legatees, still less to the disappointment of specific gifts (*f*). The heir, it may be said, is not a devisee, and, therefore, not within the rule which marshals assets in favour of devisees or legatees. He is, however, a person claiming under the testator, and it is a respect to the testator's presumed intention which causes the two funds above mentioned to be primarily applicable to the payment of his debts.

Lands charged with debts.

Next to lands descended to the heir come lands simply charged with the payment of debts. If, there-

(*c*) *Johnson* v. *Milksopp*, 2 Vern. 112; *Tait* v. *Lord Northwick*, 4 Ves. 816; *Watson* v. *Brickwood*, 9 Ves. 447.

(*d*) *White* v. *White*, 2 Vern. 43.

(*e*) *Donne* v. *Lewis*, 2 Bro. C. C. 257; *Manning* v. *Spooner*, 3 Ves. 114; *Milnes* v. *Slater*, 8 Ves. 295.

(*f*) *Anon.*, 2 Ch. Cas. 4; *Tipping* v. *Tipping*, 1 P. Wms. 730.

See Journal of M. R. & Ch. 344 note.

fore, the devisee of such lands should have paid any debts, whilst any of the previously liable property remains unexhausted, he will have a right to have the assets marshalled in his favour, and to stand in the place of the creditor, so far as regards, first, the general personal estate, secondly, lands subject to a trust or power for raising the debts, and, thirdly, lands descended to the heir (*g*).

Mortgaged lands.

We have seen that lands devised subject to a mortgage, prior to the statute 17 & 18 Vict. c. 113, are liable to the payment of the mortgage debt next after the four different kinds of property we have just mentioned. It follows therefore that, if the mortgagee should have repaid himself out of such property, the devisee of the lands subject to the mortgage will have a right to stand in the place of the mortgagee to the extent, first, of the general personal estate (*h*), secondly, of lands subject to a trust or power for payment of debts (*i*), thirdly, of lands descended to the heir (*k*), and fourthly, of lands simply charged with the payment of debts (*l*). And if the mortgaged land thus devised should itself be simply charged with debts along with other lands, then it must contribute rateably with them towards payment of the mortgage debt, if the funds primarily liable should prove deficient (*m*). But the devisee of the mortgaged lands will not be entitled to have the mortgage debt paid off at the expense either of pecuniary legatees (*n*) or of

(*g*) *Davies* v. *Topp*, 1 Bro. C. C. 524; *Harwood* v. *Oglander*, 8 Ves. 106, 124; *ante*, p. 44.

(*h*) *Philips* v. *Philips*, 2 Bro. C. C. 273.

(*i*) *Serle* v. *St. Eloy*, 2 P. Wms. 386.

(*k*) *Galton* v. *Hancock*, 2 Atk. 430; *Goodwin* v. *Lee*, 1 Kay & J. 377.

(*l*) *Bartholomew* v. *May*, 1 Atk. 487.

(*m*) *Carter* v. *Barnadiston*, 1 P. Wms. 504; *Irvin* v. *Ironmonger*, 2 Russ. & Myl. 531; *Middleton* v. *Middleton*, 15 Beav. 450.

(*n*) *Lutkins* v. *Leigh*, Cases temp. Talbot, 53.

specific legatees or devisees (*o*), for they rank in priority next after him.

Pecuniary legatees.

On the same principle pecuniary legatees, who stand next in order, will, if the personal estate out of which they were to be paid shall have been exhausted by any creditor, be entitled to have the assets marshalled in their favour as against all other property primarily liable to pay the debts. They will be entitled to be repaid out of lands subject to a trust or power for payment of debts (*p*), out of lands which descend to the heir (*q*), out of lands simply charged with debts (*r*), and also out of lands devised subject to a mortgage, to the extent to which the mortgagee may have disappointed them by resorting first to the personal estate (*s*). But they will not be entitled to repayment out of property specifically devised or bequeathed; for such property is not liable until after the pecuniary legacies (*t*). And if the property specifically devised should not have been paid for by the testator, and the vendor should exhaust his personal estate, the pecuniary legatees will not be allowed to stand in the place of the vendor in respect of his lien on the property; for the pecuniary legacies must remain unpaid before a devisee can be touched (*u*).

Vendor's lien.

Specific bequests and devises.

The position of a residuary devisee of lands being yet uncertain (*x*) we may proceed to specific legatees and

(*o*) *Oneal* v. *Mead*, 1 P. Wms. 693.

(*p*) *Haslewood* v. *Pope*, 3 P. Wms. 323.

(*q*) *Hanby* v. *Roberts*, Ambl. 128; *Sproule* v. *Prior*, 8 Sim. 189.

(*r*) *Aldrich* v. *Cooper*, 8 Ves. 381, 397; *Rickard* v. *Barrett*, 3 Kay & J. 289.

(*s*) *Lutkins* v. *Leigh*, Cases temp. Talbot, 53; *Johnson* v. *Child*, 4 Hare, 87.

(*t*) *Herne* v. *Meyrick*, 1 P. Wms. 201; *Haslewood* v. *Pope*, 3 P. Wms. 324; *Keeling* v. *Brown*, 5 Ves. 359.

(*u*) *Wythe* v. *Henniker*, 2 Myl. & Keen, 635, which seems to overrule *Headley* v. *Redhead*, Cooper, 50.

(*x*) *Ante*, pp. 35, 36.

devisees, who have a right, if called on to pay any debts of their testator, to have the whole of his other property both real and personal marshalled in their favour; so as to throw the debts, as far as possible, on the other assets which are primarily liable (*y*). It was at one time thought that a specific legacy of personal estate should be applied in payment of the testator's debts before a specific devise of real estate (*z*); but as the testator's intention is equally strong in both cases, it is now held that they shall rank equally (*a*). Any one of them therefore who may have paid the whole of the debts, will, on failure of the assets primarily liable, have a right to a rateable contribution from all the others, according to the value of each property at the time of the testator's decease (*b*). If, however, the subject of any specific bequest or devise is liable to any burden of its own, the legatee or devisee must bear it alone, and cannot call the others to his assistance. Thus the devisee of land bought by the testator, but not paid for, cannot call on the other specific legatees or devisees to pay a proportion of the purchase-money to which his land is subject by reason of the vendor's lien (*c*); although he may claim to have his land exonerated at the expense of every one else taking property primarily liable (*d*). And if any property specifically devised or bequeathed should, although complete in itself at the time of the testator's death, be subject to any incidental burthen falling upon it after the testator's decease, the devisee or legatee cannot call on any other part of the testator's estate to exonerate him. Thus lands devised subject to a

Burdens on specific devises and bequests.

(*y*) *Ante*, p. 107, and cases there cited.

(*z*) 2 Jarm. on Wills. 547, 1st ed.; *Cornewall* v. *Cornewall*, 12 Sim. 298.

(*a*) *Tombs* v. *Roch*, 2 Coll. 490; *Gervis* v. *Gervis*, 14 Sim. 654; *Young* v. *Hassard*, 1 Jo. & Lat. 472; *Jackson* v. *Hamilton*, 3 Jo. & Lat. 711.

(*b*) *Fielding* v. *Preston*, 1 De Gex & J. 438.

(*c*) *Emuss* v. *Smith*, 2 De Gex & Sm. 722.

(*d*) *Ibid.*

Head rent.

head rent, must bear that rent from the time of the testator's decease; although arrears of such head rent due at his decease must be paid for out of the general personal estate (*e*). So if leasehold property be specifically bequeathed, the rent which becomes due after the testator's decease, and also the covenants in the lease which ought to be performed after his decease, will fall on the legatee. But if the covenant should have been broken by the testator in his lifetime, the damage or expense thus arising must be paid out of his general personal estate (*f*), unless the testator shall have subjected the legatee to the payment thereof (*g*). So a fine for the renewal of a leasehold property specifically bequeathed, becoming due after the decease of the testator, must be paid by the legatee, whereas a similar fine which ought to have been paid in the testator's lifetime must be borne by the general personal estate (*h*). In like manner if railway or other shares be specifically bequeathed, calls not actually made before the decease of the testator, nor contemplated by him as necessary to make the subject of the gift complete, will fall upon the legatee (*i*); but calls made in the testator's lifetime, or to which in his lifetime he may have made himself liable, must be paid out of his general personal estate (*k*).

Rent and covenants of leaseholds.

Fine for renewal.

Calls on shares.

Marshalling between legatees.

There is yet another case in which equity out of regard to the testator's intention marshals assets in favour of legatees. This case, however, does not depend upon the same principle as those we have already mentioned;

(*e*) *Barry* v. *Harding*, 1 Jo. & Lat. 475.

(*f*) *Harris* v. *Poyner*, 1 Drew. 174.

(*g*) *Hickling* v. *Boyer*, 3 Mac. & G. 635, qu.?

(*h*) *Fitzwilliams* v. *Kelly*, 10 Hare, 266, 277, explaining *Marshall* v. *Holloway*, 5 Sim. 196.

(*i*) *Armstrong* v. *Burnet*, 20 Beav. 424; *Addams* v. *Ferick*, 26 Beav. 384.

(*k*) *Blount* v. *Hipkins*, 7 Sim. 43, 51; *Jacques* v. *Chambers*, 4 Railway Cases, 499; 11 Jur. 295; *Clive* v. *Clive*, Kay, 600; *Wright* v. *Warren*, 4 De Gex & Sm. 367.

it does not arise in consequence of a creditor having taken some part of the assets out of their usual order, but simply from the presumption that when a testator leaves legacies, he wishes that, if possible, they should all be paid. If, therefore, he should leave certain legacies payable only out of his personal estate, and certain others which he has charged on his real estate in aid of his personalty, and the personalty should not be sufficient to pay the whole, equity will marshal these legacies; so as to throw those charged on the real estate, entirely on that estate, in order to leave more of the personalty applicable to the payment of the other legacies (*l*). This rule, however, will not be applied in favour of a legatee, whose charge on the real estate has failed by reason of his decease before the age at which it was made payable. In such a case a legacy charged on land falls into the estate for the benefit of the devisee, although it is still payable out of the personalty. If then the personalty should be insufficient to pay it, equity will not, for this reason, throw it upon the real estate; for the event which has happened has, by the rules of law, exonerated the real estate from the charge (*m*). On a similar principle, courts of equity have always steadily refused to marshal assets in favour of legatees, whose legacies may have partially failed by reason of their being charged upon property, which by law was incapable of being charged therewith. Thus by the statute 9 Geo. II. c. 36, no real estate nor any personal estate savouring of the realty can be given by will in favour of a charity. If, therefore, a testator should bequeath to a charity a legacy payable out of the produce of his real and personal estate (*n*), or a simple legacy

Where a legacy out of real estate fails by a rule of law, assets not marshalled.

Assets not marshalled in favour of charities.

(*l*) *Masters* v. *Masters*, 1 P. Wms. 422; *Hanby* v. *Roberts*, Amb. 127; *Bonner* v. *Bonner*, 13 Ves. 379; *Scales* v. *Collins*, 9 Hare, 656.

(*m*) *Prowse* v. *Abingdon*, 1 Atk. 482; *Pearce* v. *Loman*, 3 Ves. 135.

(*n*) *Howse* v. *Chapman*, 4 Ves. 542; *Paice* v. *Archbishop of Canterbury*, 14 Ves. 364; *Currie* v. *Pye*, 17 Ves. 462.

without expressly charging it on that part of his personal estate which he may lawfully bequeath to charitable uses (*o*), the legacy will fail by law in the proportion which the real estate and the personalty savouring of realty in the one case, or such personalty in the other, may bear to the whole fund out of which the legacy was made payable. And equity will not assist the charity by throwing the other legacies entirely on that part of the estate which savours of the realty, so as to leave the pure personalty for payment of the charity legacy (*p*).

Marshalling assets in favour of creditors.

So much, then, for marshalling assets in favour of devisees or legatees. We now come to marshalling assets in favour of creditors. Equity not only desires to carry into effect the intentions of a testator, but also endeavours in the first place, if possible, to provide for the payment of all his creditors. If, therefore, one creditor should have two funds to which he may resort, whilst another has only one of those funds applicable to the payment of his debt, equity will so marshal the assets as to throw the more fortunate creditor entirely on that fund on which he alone can come, so as to leave more of the other fund for the payment of the creditor whose rights are limited to that fund. Thus, if, before the statute 3 & 4 Will. IV. c. 104 (*q*), creditors who hold specialties binding the heir should have exhausted the whole personal estate, equity would allow the simple contract creditors to stand in the place of the specialty creditors as against the real estate (*r*). So, if a mortgagee should exhaust the whole of the personal

(*o*) *Robinson* v. *Geldard*, 3 Mac. & G. 735; *Tempest* v. *Tempest*, 7 De Gex, M. & G. 470.

(*p*) *Mogg* v. *Hodges*, 2 Ves. sen. 52; *Att.-Gen.* v. *Tyndall*, 2 Eden, 207; 2 Ambl. 614; *Hobson* v. *Blackburne*, 1 Keen, 273; *Philanthropic Society* v. *Kemp*, 4 Beav. 581.

(*q*) *Ante*, p. 23.

(*r*) *Aldrich* v. *Cooper*, 8 Ves. 381; *Cradock* v. *Piper*, 15 Sim. 301.

estate, equity will allow the other creditors to stand in his place as against the mortgaged lands (*s*). And the same principle has also been applied to a vendor's lien on an estate for the unpaid purchase money: if the vendor should have exhausted the personal estate, equity will allow the other creditors to stand in his place as against the lands which the deceased had bought but not paid for (*t*). Every creditor must, if possible, be paid, and the rule thus established is evidently grounded on the simple principle of doing, as far as possible, justice to them all.

Vendor's lien.

There is one instance of marshalling assets amongst creditors which does not depend upon the principle of satisfying as many of them as possible, but upon the principle always adopted by courts of equity, that all creditors have morally an equal right to be paid. If any bond creditor, who is preferred by the executor in the distribution of legal assets (*u*), should claim to participate in equitable assets, which belong to all the creditors equally (*x*), he will be obliged to wait until the other creditors shall have had their claims made up, out of the equitable assets, to the same proportionate amount as himself (*y*). "This is a matter," said Lord Talbot, so long ago as 1736, "that has been so often determined, that it will be unnecessary to cite authorities, and it is founded on this, that by natural justice and conscience all debts are equal, and the debtor himself is equally bound to satisfy them all" (*z*). To this rule equity still steadily adheres, in all cases where the right of one creditor is not by positive law

Marshalling in favour of equality amongst creditors.

(*s*) *Aldrich* v. *Cooper*, 8 Ves. 381; *Gwynne* v. *Edwards*, 2 Russ. 289, n.

(*t*) *Selby* v. *Selby*, 4 Russ. 336.

(*u*) *Ante*, p. 9.

(*x*) *Ante*, p. 4.

(*y*) *Morrice* v. *Bank of England* Cases temp. Talbot, 218, 220; *Plunkett* v. *Penson*, 2 Atk. 294; *Deg* v. *Deg*, 2 P. Wms. 460.

(*z*) Cases temp. Talbot, 220.

superior to that of another. When will the legislature follow so good an example?

Marshalling in favour of the widow's paraphernalia.

There is one case in which equity will marshal assets in favour of a person who is neither legatee, nor, strictly speaking, a creditor. The widow of a deceased person is entitled to her paraphernalia, without regard to any bequest of them which her husband may have made, but subject to the payment of his debts. If, therefore, any creditor should have seized upon the wife's paraphernalia, equity, out of regard for her claims, will so marshal the assets as to allow her to be recouped out of any part of her husband's property (*a*), except perhaps real estate, which may have been specifically devised prior to the statute 3 & 4 Will. IV. c. 104 (*b*); but, since this statute, it would seem that this exception would not be made, for the widow, as to her paraphernalia, is in a position similar to that of a simple contract creditor (*c*), and such a creditor may now claim to be paid out of any part of the property of the deceased.

(*a*) *Northey* v. *Northey*, 2 Atk. 78; *Snelson* v. *Corbet*, 3 Atk. 369; *Tipping* v. *Tipping*, 1 P. Wms. 729.

(*b*) *Probert* v. *Clifford*, 1 Amb. 6; 2 P. Wms. 544, n.

(*c*) *Lord Townshend* v. *Windham*, 2 Ves. sen. 7.

CHAPTER IX.

SUGGESTED CHANGES.

Complication of the law.

THE first thing that strikes one, on a review of the whole subject, is the strange complication in which it is involved. Crown debts, judgment debts, specialty debts in which the heirs are bound, specialty debts in which the heirs are not bound, and simple contract debts, lie heaped one above another, then scattered on a level at the caprice of the debtor, then varied at every turn of his intention, as rapidly and grotesquely as the colours of a kaleidoscope. Now why should this be? Complication is itself an evil; and at the present time, it is one of the greatest evils from which the law of England suffers. It is now some time since the great historian Hallam predicted that the law of England would be simplified in the worst and least honorable manner, a tacit agreement of ignorance amongst its professors (*a*). This prophecy has approached more nearly to its fulfilment than some may suppose. No person can be much engaged in the practice of the law without being surprised, (if the author may speak from his own experience,) both at his own ignorance on subjects with which he thought he was acquainted, and also at the ignorance of others, who are generally supposed to know. No man can possibly overtake the whole. Anomalies are so frequent, and principles when discovered lead to so little, that an inert acquiescence in the last decided case satisfies the mass, a strong memory usurps the province of a sound judgment, and to advise correctly on future cases daily becomes more difficult. Now, most of the

(*a*) 2 Hallam's Middle Ages, 470.

remedies which have been lately applied, and some of those proposed which have found most favour, appear to have been brought forward without any regard to this evil. The root is not struck at. The most obnoxious branch is lopped off, and the tree remains. Thus a contingent remainder may still fail for want of a particular estate to support it, but in sundry special cases it is supported by a parliamentary prop (*b*). Again, a man may now by a recent act assign leaseholds to himself and another jointly (*c*); but if he should attempt to convey freeholds in the same way, his endeavour will be frustrated, unless he avail himself of the technicalities of the Statute of Uses (*d*). By another recent act, the devisee of mortgaged land must now pay the mortgage out of the lands (*e*), but the legatee of a mortgaged chattel may have it exonerated as before. The law of real property is notoriously difficult; and one more huge difficulty is straightway proposed to be added to it in a new system of conveyancing, which can only be of partial application. So the law of assets is felt to be an evil; and straightway it is proposed to add the "dead men's clauses" to the bankruptcy bill. The symptoms are grave and demand serious attention; but the ordinary practice of our law reformers touches the symptoms only, whilst it aggravates that more serious malady of complication, from which our law so long has suffered.

What contradictions, what changes of mind, what vexation and expense have arisen in relation to the law of assets! Nearly every point has been decided both ways, and between the legislature and the lawyers, what is its present state? a matted heap of complications. Can it not be simplified? We turn to Chapter I.

(*b*) Stats. 10 & 11 Will. III. c. 16; 8 & 9 Vict. c. 106, s. 8.

(*c*) Stat. 22 & 23 Vict. c. 35, s. 21.

(*d*) Stat. 27 Hen. VIII. c. 10,

(*e*) Stat. 17 & 18 Vict. c. 113.

of our book, and see a distinction pretty plainly drawn, after long contest and confusion, between legal and equitable assets. But why this distinction? If equality be not equity, why is equality ever enforced? but if equality be equity, why is the law ever inequitable? Why? no answer can be given. We can show how it came to be so, and that is all.

Legal and equitable assets.

Equality is equity, and that in a broader sense than has been maintained by the courts of equity, who, however, have done as much as they could. To begin with crown debts, why should a crown debt be preferred to any other? Here again history steps in, and tells us of the prerogatives and power of the crown in ancient days, and that formerly crown debts really were due to the crown. But it is not so now. Her present Majesty has never received a sixpence more from the enforcement of any crown debt which has become due in her reign. Crown debts belong to the public generally. But the public is composed of individuals. A loss has to be incurred. Is it better that that loss should be thrown on a few unlucky creditors, or sustained rateably by the whole nation? Every person acquainted with the principles of ordinary insurance, must feel that the loss to the country can be more easily borne than the loss to individual creditors. To each member of the community the additional burden is so infinitesimal that it would not be felt; to the other creditors the crown debt may be ruin, by swallowing up the whole of the debtor's assets. It is not, however, wished to postpone the crown debt to other debts, but simply to place it on the same level. From this simple change greater advantages would result, than may at first sight appear. There is now a register of crown debts and liabilities, established at the Court of Common Pleas, and every time a purchase or mortgage of land takes place, this registry has to be searched, to see that the vendor's or mortgagor's

Equality is equity.

Crown debts.

name is not there. This registry was of itself a great boon, and the public have to thank Lord St. Leonards for it. Before this, purchasers and mortgagees had to make their round of several public offices, to ascertain with some reasonable probability, that there were no crown debts against the vendor or mortgagor. But the registry itself entails great expense. There is not merely the shilling fee charged for searching, but the expense incurred in making the search, and in the consequent enquiries necessary, if identical names be found with different addresses. Were the priority of crown debts abolished, this index might be abolished too. A search for crown debts is generally made on the eve of the completion of the purchase; and cases have more than once occurred within the author's knowledge, of vexatious postponement of a purchase from the discovery of some crown debt, which the vendor probably had forgotten. The chief opponents of the proposed change are official persons, to whom it is a great convenience to have severe and summary remedies against their sub-officials, who may become defaulters. But other large establishments which have not such powers guard themselves, first, by caution in choosing their servants, and secondly, by taking proper security for their good behaviour. The knowledge that a crown debt is preferred to all others, tends to foster carelessness in the choice of public servants, to which there would be no temptation, if ordinary remedies only were available.

Judgments.

With regard to judgments, the author may perhaps be excused for quoting his own remarks made some time since in a little work, which, being professedly for the use of students, may not be known to many of his readers (*e*). "The proper function of a court of judicature would seem to be the settlement of disputes.

(*e*) Principles of the Law of Personal Property, p. 96, 1st ed., 103, 4th ed.

In our law, however, the judgment of the court is permitted to be made use of, not only to settle contested claims, but also as a better security for money admitted to be due. The reason of this perversion of the proper end of a judgment has been the superior advantages possessed by a creditor having a judgment in his favour. So long, however, as the court exercises its legitimate function of deciding on contested claims, there seems to be no reason why a debt established by the decision of the court should have any preference over one which has never been disputed. If this were the case, the use of judgments as mere securities by collusion or agreement of the parties, would at once fall to the ground; and an end would be put to a very fruitful source of litigation and fraud. Practically there are but two reasons why payment of a debt is withheld, namely, either because the debtor, though able to pay, doubts his liability, or because he is unable to pay, though he knows he is liable. In the first case an action at law decides the question; but the judgment given by the court, in exercise of its proper function, is scarcely ever followed by the taking out of execution. The debt being established, the debtor pays it, and the judgment is immediately satisfied. The creditor has the advantage of the decision of the court, but he has no occasion for any of those extraordinary remedies to which his position as a judgment creditor entitles him. If, however, the debtor is unable to pay, judgment is obtained merely for the sake of its fruit. The creditor endeavours, by suing out an execution, to obtain an advantage over other creditors, who may not have put themselves and the debtor to the same trouble and expense. But inability to pay one debt is presumptive evidence of inability to pay others; and when a man is unable to pay all his creditors in full, it is time that a distribution should be made of his property amongst his creditors rateably. The extraordinary privileges con-

ferred on a judgment creditor seem, therefore, in most cases, practically to end in an undue preference of a pressing creditor over others who have as good a right to be paid."

The Irish law of judgments.

Time and reflection have not altered the author's views. On the score of complication it may be added that there can be no valid reason why the law of judgments in Ireland should be so different from our own. Either let judgments be adopted as a means of charging lands, and then invest them, as in that country, with the properties of a mortgage, or else place them at once on a level with other debts. The latter course appears the more philosophical; the chief objection arises from the present clumsy mode of effecting mortgages by the law of England. Amend the law of mortgages by prohibiting the fee simple to be vested in a mortgagee, and there will be no excuse for retaining the priority of judgment debts. Debts will then be reduced to their simple and natural division of secured and unsecured. A man may either trust his neighbour's general credit, or he may require the security either of other persons as sureties, or of a mortgage or pledge of some specific property. A general mortgage of all a man's property ought not to be allowed. This state of things would be simple, reasonable, and, what is much, also intelligible. The present system is not only troublesome to the debtor, but also adds a serious item to the expense and delay so much complained of in conveyancing. Every five years the creditor must remember to re-register his judgment, or he will lose his priority. And every time a house or land is sold, the registry must be searched for judgments. The provision recently made for affecting purchasers by writs of execution only (*f*), has not been satisfactory, on account of the index being in the

Mortgages.

(*f*) Stat. 23 & 24 Vict. c. 38, s. 1.

names of the creditors and not of the debtors (*g*). The law of judgments is itself a study, so nice are the distinctions according to the nature of the debtor's property and the priority of registration. Happy would that generation of lawyers be who should have no need to learn it!

Specialties binding the heir.

Creditors by specialty, in which the heirs are bound, have the steady opposition of the Court of Chancery, which, whenever it can fairly catch them, places them on a level with simple contract creditors. In truth they have little to say for themselves, except that history and antiquities are all in their favour. They can trace back their title to the days when lands were inalienable by will, and when heirs had an indefeasible right of succession. But things have long since been altered. The heir, as heir, now seldom succeeds to the property. He may obtain it indeed; but it will be as a purchaser under a settlement, or as a devisee under a will. In what respect has a creditor who holds a bond, a better right to be paid than the *bonâ fide* holder of a bill of exchange, or the sufferer from a breach of trust? (*h*). The butcher and the baker cannot demand bonds from their customers, yet few creditors can have a higher equity. One great incidental advantage from abolishing the priority of specialties binding the heir, would be the wiping off from conveyancing of the stigma so often attached to it, on account of the perpetual recurrence of the words "heirs, executors, &c." As the law now stands, the heir must be expressly named and bound in every covenant, otherwise the covenantee may lose his priority as the holder of a specialty binding the heir. The length of deeds is also thus increased by a number of littles, which, added up, must amount to something considerable every year.

(*g*) Sect. 2. (*h*) *Ante*, p. 15.

Specialties not binding the heir.

The only ground on which specialties not binding the heir can claim their priority is, that they were invented before the art of writing became common, and when men used their seals for want of knowing how to put their signatures. They are preferred in payment out of the personalty, but not out of the real estate (*i*). Why should they not always rank with simple contract creditors?

The Statutes of Limitation.

In carrying into effect the proposed change of putting all creditors upon an equal footing, some care would be necessary. The most important point appears to be that relating to the Statutes of Limitation. Should six years only be allowed, as is now the case with a simple contract debt, or twenty, as is now the case with a bond? The growing facility of communication seems to point rather to a contraction than an extension of the Statutes of Limitation.

Leaseholds for years.

To place all creditors on a level would be to deprive the subject of half its complexity. There would still remain that priority of application of different funds, which has arisen from an anxious wish to give effect to the intentions of the testator. So long as an estate is solvent, there can evidently be no harm in allowing the testator to say out of what portions of his property he wishes his debts to be paid. The rules on this subject, therefore, need little disturbance. The case of *Lady Langdale* v. *Briggs* (*k*), however, suggests that it might be desirable to place leaseholds for years along with other real estate, rather than amongst the personalty. Leaseholds certainly partake much more of the nature of real estate than of mere personalty. That they are classed as personalty and devolve on the executor, is owing to the historical fact, that they were

(*i*) *Ante*, pp. 9, 26.
(*k*) 2 Jur. N. S. 982, 995; *ante*, p. 11.

anciently of little account. At the present time, however, they occupy an important place, and their position amongst goods and chattels is quite anomalous. It is almost as difficult to realize a leasehold property as to sell a freehold. Were the rules which regulate freeholds a little simplified, there would seem to be no well-founded objection to placing leaseholds for years along with freehold estates. A step has been lately made in this direction, by subjecting leasehold estates to the same succession duty as other lands. It only remains to go a step further. At present a leasehold estate cannot be given by deed to A. for life, with remainder to B. absolutely. Why should not this be allowed? Place leaseholds in their right position, and there will be less temptation to the courts to swerve from the ancient rule, which makes the whole of the general personal estate primarily applicable to the payment of debts.

Evil of long term of years without rent.

The existence of long terms of years without any rent is itself an evil, which can only be tolerated on account of the difficulty, as the law now stands, of securing charges on settled property without their aid. They tend to make titles insecure, and sometimes lead to great expense and litigation. Not long ago the author saw an eighty years' title to an estate as freehold, which any court of equity would have compelled an unwilling purchaser to take, but which afterwards turned out to be only the residue of a long term about to expire. In these cases the title to the reversion in fee, however well deduced on paper, must always be dangerous as well as difficult. It would, in the author's opinion, be very desirable if such terms could be abolished.

As to debts being paid out of real and personal estate by the same officer.

The manner in which the personal and the real estate of a testator are now applied in the payment of his debts, naturally suggests the desirableness of placing

the duty of paying the debts in the hands of the same officer. Thus, where there is any trust or charge on the real estate for payment of debts, the personalty must not first be exhausted, but enough must be kept to pay the pecuniary legacies, and the debts to that extent must be thrown upon the lands charged (*l*). And when there is no such trust or charge, specific legatees of personal estate have to contribute rateably with specific devisees of real estate. But the personal estate only is in the hands of the executor, except in special cases. It is, no doubt, a sense of the inconvenience of a divided administration which has given countenance to the modern invention of a power for the executors to sell real estate derived from a charge of debts. The great points to be aimed at appear to be two; first, the safe, speedy, and inexpensive administration of insolvent estates; and, secondly, a regard to the intentions of the testator, whose assets are abundant, as to the fund whence his debts shall be paid. With regard to both these points, the law seems capable of improvement. The present law, where there is only personalty, arms the executor with abundant powers of alienation; but it may perhaps be questioned whether, when the debts are small and the personalty is large, and much more when it consists of lands held for long terms of years, the power of the executor is not too great, and may not be exercised to the disappointment of the testator's intentions and to the loss of his legatees. The provisions now made for the administration of the personal estate of deceased persons by summons in equity (*m*), are a great improvement in the law. But the real estate of a deceased insolvent cannot always be so easily appropriated to the payment of his debts. It seems to the author that if both the real and personal estate of deceased persons were first to vest in the

(*l*) *Ante*, pp. 106, 112.

(*m*) Stat. 13 & 14 Vict. c. 35, s. 19; 15 & 16 Vict. c. 86, s. 45; 23 & 24 Vict. c. 38, s. 14.

executor or administrator, or to be subject to a power of alienation by him, provisions might be made with advantage for restricting his power, both as to personalty and to realty, in cases where the assets are ample. A power of sale vested in another, and perpetually hanging over one's property, is not a pleasant incident to its enjoyment. The present powers of the executor were given to him of old time, when personalty was of much less account than it is now. The difficulties of realizing lands may be traced back to their ancient feudal and inalienable nature. Both kinds of property are now required sometimes to be sold, at others to be merely enjoyed in quiet. The one idea perpetually present in the minds of modern legislators seems to be that of facilitating sales; and no doubt, when lands, whether leasehold or freehold, ought to be sold, every facility should be given for the purpose; but their safe enjoyment and easy devolution are also important points, for lands are not, like certain razors, only made to sell.

Property held in undivided shares.

One great improvement in the law, would be further provisions for the sale of property held in undivided shares. When a house becomes divided into fractions of twentieths (and much smaller fractions sometimes occur), the power which the law gives of effecting a partition, becomes merely illusory. If any holder of an undivided share of a given degree of minuteness, could compel the others either to sell the entirety, or to purchase his share, or if the holders of shares to a given amount could compel a sale without the concurrence of the others, much waste and expense would often be avoided. When nothing can be done unless all concur, the obstinacy of one, or the accident of his absence, infancy, or other disability, frequently prevents the property from being turned to any valuable account. The creditors of deceased shareholders suffer amongst others;

for who would buy the fraction of an estate in which many other persons are interested? According to the author's experience, the division of property into small shares held in common, is one of the most fruitful sources of that expense and delay in sales, which are now so much complained of. If property is put up for sale by auction, and it turns out that twenty people must concur before a proper conveyance can be made, no wonder that the purchaser has to complain of expense and delay. This evil, though so common, seems never to have been grappled with in the only way in which it seems possible to meet it successfully. The recent case of *Green* v. *Thompson* (*n*), is a striking instance of the difficulty occasioned by property becoming vested in undivided shares. The property became first divided into fifths; each of these fifths became the subject of settlement, except one, which became again subdivided into other fifths, each of which became in different ways entangled; and the result was that a sale which had been ordered by the court was, after great expense and litigation, ultimately stopped, for want of a perfect title.

Inheritance.

The author has elsewhere stated the reasons which induce him to think that the abolition of the present law of inheritance, except in cases of entailed estates, would be an improvement (*o*). The existence of peculiar customs of descent, such as gavelkind and borough-English, is an evil not likely to be abated, so long as the law of inheritance continues in its present form. Speaking generally, the ordinary disposition which would be made by a person of the class amongst which intestates are most frequently found, would probably be a devise of his real estate to trustees, upon trust to sell

(*n*) 1 Johns. 418. See also *Re Burdin's Will*, L. J., 5 Jur. N. S. 1378.

(*o*) Principles of the Law of Personal Property, 266, 1st ed., 303, 4th ed.

for the equal benefit of his children or relatives. The law should evidently strive to do that, in the accident of intestacy, which the deceased, if a prudent person, would most probably have himself done. Entails and titles, as well as real property belonging to the owner of a descendable title, should of course be excepted. And even with this exception, it must be owned that at present the subject is so little understood by the general public, and is thought to be so much interwoven with the principle of family settlements, from which in fact it is distinct, that the actual bringing forward of any measure on this subject at the present time would probably be inexpedient. Recent events seem to indicate that any movement is to be deprecated which might tend, though indirectly, to strengthen the hands of those who would throw the preponderance of political power on the lower classes.

Husband and wife.

The case of *Johnson* v. *Gallagher* (*p*), suggests the desirableness of a thorough revision of the law of property as connected with the relation of husband and wife. The system under which we live is grounded on the simple rules of the common law, which are now applied to important kinds of property unknown to that law, and are rendered tolerable only by the invention of the equitable doctrine of separate use. At law the wife is merged in the husband, and he has a right to all her property of a personal kind on which he can lay his hands. If she is possessed of lands for a thousand years, the husband may dispose of them at his pleasure; but if they be freehold, she must concur with him, and must at the same time separately acknowledge the deed before a Judge or Commissioner, as her own independent act. This provision seems to be thought by some

(*p*) 7 Jur. N. S. 273; *ante*, p. 98.

a desirable protection. It is however the fact, that no lawyer, in drawing a settlement, ever thinks of placing the settled lands in such a situation as that this provision should have to be resorted to. Either the land is made inalienable, or else alienable by the husband or the wife, or by both, as may be agreed on, simply by a deed executed by one or both; and if the settlement should be so framed as to require a separate acknowledgment by the wife, the framer would certainly be under the imputation of having made a blunder. Where then is the advantage of a protection which everybody sedulously avoids? With regard to her personal property, the common law rights of the husband are in some degree checked by the wife's equity to a settlement. But the idea of having first to pay the costs of a chancery suit, and then the costs of a settlement, could scarcely have occurred to any others than those whose view of such a clumsy expedient is taken independently of the cost it occasions. It would be very desirable if the law were such that persons of small property might prudently marry without any settlement. The author has elsewhere given more at length his reasons for thinking that if, when the wife's property is aliened by deed, her signature were necessary, but her separate examination were dispensed with, the law would be improved (*q*). The act of marriage might be made of itself to give the wife a separate property in her own investments. And with regard to creditors, the liability of her property, as well as of her husband's, should at least be clearly defined. In some respects the laws of the continental nations might on this subject be consulted with advantage. In England the husband's liability for his wife's debts is the apology for much that had perhaps better be altered.

(*q*) Principles of the Law of Personal Property, p. 288, 1st ed., 330, 4th ed.

Appeals in Chancery.

The extraordinary oscillations of judicial opinion on the different subjects discussed in the preceding chapters, seem to suggest the great desirableness of a court of appeal, strong not only in talent, but in numbers. The reversal of the decision of a Judge by a single Judge, however eminent, can never be so satisfactory as its reversal by the united judgment of many. The courts of common law possess this advantage in the Court of Exchequer Chamber. On every ground reversals and alterations are to be deprecated. In our law a judgment is too much in the nature of an *ex post facto* enactment, and when it shakes titles which were once thought secure, the evils arising from it can hardly be exaggerated. On the grounds of expense, delay and vexation, the double right of appeal now enjoyed by the litigious must be acknowledged to be an evil. One appeal, and that to a court of sufficient numbers, seems a relief so desirable, that it is to be hoped it may one day be granted.

Decisions as to implied power of executor to sell under a charge of debts.

With regard to the decisions on which we have already commented as to the implied power of an executor to sell under a charge of debts, the author, whilst urging a general parliamentary revision of the subject, cannot but agree with Mr. Hayes (*r*) in thinking that the complication will necessarily go on increasing, unless it be resolutely brought back by a self-sacrificing effort of the judicature to the simple intelligible principles, on which it originally rested. The broad doctrine, acted on in *Wrigley* v. *Sykes* (*s*), that a charge of debts empowers the executor to sell, has already been shaken, both by the weighty opinion of Lord St. Leonards (*t*), and by the doubts recently expressed by the Lord Justice Knight Bruce in the case of *Cook* v.

(*r*) See Appendix A.

(*s*) 21 Beav. 337; 2 Jur. N. S. 78; *ante*, p. 87.

(*t*) Sugd. V. & P. 445, n., 13th ed.; *ante*, p. 90.

Dawson (*u*). Practitioners should take warning to beware of titles founded on this doctrine. The modified doctrine put forward by the Lord Justice Turner, in his judgment in *Robinson* v. *Lowater* (*v*), has the support not only of his own eminent name, but also of the eminent Judge who followed it (*x*). It is argued that the charge of debts amounts to a direction that they shall be raised and paid out of the estate, and that, as, when the estate is settled, the devisees cannot raise it, the testator must have intended that some other person should; and this argument, we have seen, was followed even in the case of a single sum (*y*). But with due deference to such great authorities, does not the testator, by settling the estate, show plainly that he does not wish it to be sold? A mere charge of debts is simply the expression of a desire to be honest; and it may safely be affirmed, that the last thing contemplated by a testator, who charges a settled estate with a legacy or portion, is, that the estate should be sold in order to raise it. If the charge be too onerous, a sale may be necessary; but this is not in pursuance of the testator's intention, but an unavoidable contingency evidently not contemplated by him. In many cases sums charged are intended to remain at interest on the security of the estate; and where the security is ample, there is seldom any difficulty in realizing them by a transfer. For many years practitioners went on on the ground that a mere charge was to be enforced in equity only, and could make no difference in the construction of the will. For this position, we have already shown, there was ample authority (*z*). For the sake of convenience this principle has now been broken. The inconvenience of restoring

Robinson v. *Lowater.*

(*u*) Lords Justices, March 18, 1861; *ante*, pp. 73, 94.

(*v*) 5 De Gex, M. & G. 272; *ante*, p. 86.

(*x*) *Eidsforth* v. *Armstead*, 2 Kay & J. 333; *ante*, p. 90.

(*y*) *Ibid.*

(*z*) *Ante*, pp. 65, 67.

it must be infinitely less than the evils occasioned by its infraction. A cloud has been thrown over numerous titles, and the practitioner is left in uncertainty as to what the principles really are. To break a principle for the sake of convenience is like taking up a railway to mend a fence. Nobody knows how many persons may be upset by it. We want our legal principles to travel on. How can practitioners get on without them?

Case-made law.

Unfortunately the Judges themselves have no power to decide on any disputed rule of law, until some case raising the point be actually brought before them. A Judge of a court of appeal may see decision after decision, which he thinks erroneous, made by an inferior Judge, and yet he is powerless to alter them, until some suitor pleases to appeal. How long a period may intervene before the subject, which we have discussed, may again come before the court of appeal, if ever it should, it is impossible to say. In early times the sluggishness of the legislature obliged the Judges to make law in cases where they found none. This has gone on by force of habit to the present time; and though parliament is now sometimes too ready to adopt the crude suggestions of well-meaning reformers, yet, by a lawyer, decided cases are still looked to as marking out the law. The perpetual reference, in legal arguments, to cases in point, as establishing, rather than illustrating, the doctrines of law, has not been without its evils. Not the least is a certain tolerance of anomalies, which custom makes familiar. A principle is infringed by such a case, or exceeded by some other, and in the strife of cases the spirit of philosophy vanishes from the law. Certain it is, that we are looked upon by many foreign jurists, as a long way behind in the science of jurisprudence. The time seems to have come, when some more scientific machinery might advantageously be applied for extracting and expounding

Proposal of Sir Richard Bethell.

the principles of law. A plan for this purpose was lately put forth by an eminent living lawyer, in an Address to the Juridical Society (*a*). "An advocate knows," says Sir Richard Bethell (*b*), "that a certain rule has been enunciated, but is uncertain where to find it. He therefore cites A. *v.* B., C. *v.* D., and so on, to the end of the alphabet, and applies this laborious process to show that such and such is the rule. It is frequently extracted with great difficulty, and often with some uncertainty; for the opposite counsel says there were some particular facts in the cases cited, which are not in the case at the bar; the Judges accede to the distinction suggested, and say the cases are different, and that dicta must be interpreted *secundum subjectam materiem;* so that the unfortunate rule is often maimed and mutilated in extracting it from the mass of rubbish in which it is involved. Why should not all this be submitted to men able to examine and comprehend the authorities, and embody the rule to be derived from them in one single abstract proposition, which should remain a neat, ready and applicable instrument, fit to be used at all times?" These remarks deserve greater consideration than they yet appear to have obtained. It presses severely on individual suitors, that the law should be expounded at their expense. The burden should be undertaken by the whole community; and, although a nominal addition might thus be made to the public expenses, yet for all practical purposes the public would be gainers. They would no longer live, as they now do, subject to the contingency of being crushed by a law-suit arising out of some ordinary transaction of life, and rendered terrible by the uncertainty of the law.

(*a*) Sir Richard Bethell's Address on vacating the office of President of the Society, at the Anniversary Meeting, 21st Feb., 1859, 2 Juridical Papers, 129.

(*b*) 2 Juridical Papers, 134, 135.

APPENDIX (A).

Referred to, p. 68.

The Author is indebted to MR. CHARLES HALL *for the following Extract from an Opinion of the late* MR. DUVAL :—

"It is open to contend, on the authority of the late cases of *Shaw* v. *Borrer* (*a*), and *Ball* v. *Harris* (*b*), that in consequence of the charge for payment of debts, the devisees can make a title, as the persons in whom the legal estate is vested, without reference to their having been trustees under the original will. In my opinion the title cannot safely be vested on this ground. Assuming that the principle of the cases cited applies to a case like the present, where the purchase is not made from parties taking the legal estate under the original will, I consider (in common, I believe, with many gentlemen of great eminence), that the cases were decided upon so entire a misapprehension of the effect of the early cases and the practice of conveyancers, that, although a decision of the highest tribunal, perfect reliance cannot be placed upon the doctrine that, where there is a charge for debts, a bare trustee of the legal estate can make a title tc a purchaser. See *Hayes's Conveyancing* (*c*), where the distinction is taken, which, I believe, was invariably acted upon until the recent cases. The practice was to go to the court, where there was a mere charge of debts, and the parties to whom the estate descended, or was devised, could not make a title at law and in equity independently of the charge. Whatever questions, however, may exist as to whether the cases I have referred to were rightly

(*a*) 1 Keen, 559.
(*b*) 8 Sim. 485; *S. C.*, on appeal, 4 Myl. & Cr. 264.
(*c*) 5th ed., vol. i. p. 325.

decided, I do not think there is any probability that the acceptance of a title founded on them could now be resisted with success.

"L. D.
"May, 1842."

The following Extracts from a Letter from MR. HAYES, *and from* MR. HAYES'S *Opinions, which the Author has obtained permission to publish, appear to him to throw much light on the subject:—*

"20th February, 1856.

"The subject is of almost universal interest. My own impression is, that it will never be rescued from its present complication (which, while the doctrine is floating loose in so many judicial minds, without any principle to fix it, will necessarily go on increasing, as every step is merely a deeper plunge into the slough), unless (like the *Tullett* v. *Armstrong* embranglement) it be resolutely brought back by a self-sacrificing effort of the judicature to the simple intelligible principles on which it originally rested. The confusion began with *Shaw* v. *Borrer* (*a*), and was worse confounded by *Ball* v. *Harris* (*c*). If I mistake not, I have heard a distinguished equity Judge, then at the bar, remark that the Master of the Rolls and Lord Chancellor, when deciding those cases, did not distinctly know what they were about. Nothing could be plainer than the law as it was understood by the old conveyancers. 1. If there was a *charge* simply, then the ownership went on *as if the charge were out of the will*, unless or until some proceeding was taken by the creditors (if any), who could not follow the estate into the hands of a *bonâ fide* purchaser (*i. e.*, for money) or mortgagee, nor make him responsible for the application of his money. Thus the real estate was charged and devised to A. in fee. A. settled the estate, with power of sale, in the trustees, who sold to B.; the title of B. was absolutely clear of this charge. That such was the under-

(*a*) 1 Keen, 559; *ante*, p. 68. (*b*) 4 Myl. & Cr. 264; *ante*, p. 71.

standing is palpable from the fact that title after title has been accepted under purchasers and mortgagees, where a charge of debts and legacies had been created by some prior will, *without at all looking to the mesne deduction of the vendor's or mortgagor's title.* As a further illustration, suppose that A. mortgages to B. to secure his (A.'s) own pre-existing debt with power of sale, and B. sells to C., B. would take subject to the equitable lien, but C. would be exonerated. 2. If a *trust* was created (as distinguished from a simple charge), it had all the incidents and consequences of any ordinary trust, with only this peculiarity, that the omission, where it happened to occur, of an express authority to give discharges, was supplied by the nature of the trust itself involving an utter impossibility of seeing to the application. Cases have arisen in which the question has been, whether the failure of the express trusteeship let in the owner or the ultimate trustee (the Court of Chancery), as where the devise was to trustees for sale who died in the testator's lifetime or disclaimed, and the sale or mortgage was assumed to be made by the beneficial devisee or heir. I remember a case (it arose upon ——'s will) where the real estate was devised to A. and B. for a term upon trust to sell for payment of debts, with remainder to C. in fee. The trustees disclaimed and C. mortgaged. There was, I think, a difference among the Equity responses, oracle Bell against oracle Richards; but, if I rightly recollect, a lender accepted a transfer of the mortgage under the advice of one or other of these "glorious uncertainties," (regardless, too, of the fact that the mortgage was made for securing an old debt of the mortgagor,) and on treaty for a subsequent transfer the mortgage title so acquired was rejected by certain other high priests of Equity. 3. It never can be *known* that the debts have been satisfied; it may be presumed, or conjectured or surmised. *Time*, therefore, is not of the essence; so, *notice* is unimportant, or rather, is impossible. This fact should be kept in view throughout the discussion; yet, of something which cannot be known to anybody, the executor is assumed to be in the secret. He is evidently a very gifted personage; has not only, by implication and tacit intendment, unusual powers of alienation, but, by in-

tuition, a perfect insight into all his testator's liabilities, present, future and contingent. As he is a sort of quasi ecclesiastical functionary, perhaps the law presumes that the testator *confessed* to him. 4. The questions whether there is a charge only or a trust, whether an authority to sell is given, and to whom and all other possible questions arising out of the construction of the will, are to be resolved by the application of the ordinary rules of construction, which must not be resolved from sympathy with creditors or from any morbid dread of the Court of Chancery, or any motives of convenience. As well in regard to these matters as in regard to all others, the point must be determined by construing the words of the will, and the construction must proceed upon grounds strictly judicial. These ideas, thus rapidly and rudely thrown together, 'notions fagotted as they fell,' may possibly be suggestive of maturer thoughts for a dissertation, &c.

* * * * *

"Yours very truly,

(Signed) "WILLIAM HAYES."

Extracts from MR. HAYES'S *Opinions*:—

"There is not, I apprehend, any distinction between a charge of debts and any other charge, except that in the instance of a charge of debts a purchaser is, from the mere impossibility of ascertaining them, exonerated from seeing to the application of the money. The charge follows the estate into whatever hands and by whatever means it may pass with notice of the charge, and may be enforced against the party for the time being entitled, but who may not only, like any other incumbered owner, sell to satisfy the charge, but has, from the nature of the charge, an implied power to give a discharge for the purchase-money against the creditors.

"On the other hand there is, I conceive, a marked distinction between a trust and a charge; the one involving personal confidence, incapable, without express provision, of

delegation; the other, attaching only as a general equity, to have the requisite amount raised by sale or mortgage or other means, out of the estate."

Again,

"Suppose that A. devises lands to B., charged with debts and legacies. Then B. devises those lands to trustees, upon trust to sell and pay his (B.'s) debts and legacies, and divide the surplus among the children of B., saying nothing about the debts and legacies of A., because perhaps B. believed that they were paid, it has always been considered that the devisee in trust of B. may sell and convey a good title to a purchaser, discharged from the debts and legacies of A. So, if A. were to settle the lands on marriage, giving the trustee of the settlement a power of sale, but making no express provision for the payment of the debts and legacies, it has always been understood that a purchaser of the estates would be exonerated from seeing to the application of his money. It does not follow that, because the deed is silent, the sale is not for payment of the debts; it may be for that very purpose."

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